EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 86-319-CFX
Status: GRANTED

Title: John R. Van Drasek, Petitioner
v.
James H. Webb, Jr., Secretary of the Navy, et al.

Docketed:
August 28, 1986

Court: United States Court of Appeals for the Federal Circuit

Counsel for petitioner: Milliken,Stephen G.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jun 30 1986		Application for extension of time to file petition and order granting same until August 29, 1986 (Chief Justice, July 8, 1986).
2	Aug 28 1986	G	Petition for writ of certiorari filed.
4	Sep 25 1986		Order extending time to file response to petition until November 2, 1986.
5	Nov 3 1986		Brief of respondents Lehman, Sec. of Navy, et al. in opposition filed.
6	Nov 5 1986		DISTRIBUTED. November 26, 1986
7	Dec 1 1986		Petition GRANTED.
9	Dec 29 1986		Order extending time to file brief of petitioner on the merits until January 30, 1987.
10	Jan 27 1987		Order further extending time to file brief of petitioner on the merits until February 3, 1987.
11	Jan 30 1987		Brief amicus curiae of ACLU, et al. filed.
12	Feb 3 1987		Brief of petitioner John Van Drasek filed.
13	Feb 3 1987		Joint appendix filed.
14	Feb 5 1987		Record filed.
15	Feb 5 1987		Certified copy of original record, 2 boxes, received.
16	Mar 11 1987		SET FOR ARGUMENT. Wednesday, April 29, 1987. (3rd case).
17	Mar 18 1987		Brief of respondents Lehman, Sec. of Navy, et al. filed.
18	Mar 18 1987		Lodging recieved, 10 copies, box.
19	Mar 25 1987		CIRCULATED.
20	Apr 22 1987	X	Reply brief of petitioner John Van Drasek filed.

86-319

No._____

FILED

AUG 28 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN R. VAN DRASEK,

Petitioner,

v.

JOHN LEHMAN,
SECRETARY OF THE NAVY,
CHAPMAN COX,
ASSISTANT SECRETARY OF THE NAVY
FOR MANPOWER AND RESERVE AFFAIRS,
AND
THE UNITED STATES OF AMERICA

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

STEPHEN G. MILLIKEN, ESQUIRE
Milliken, Van Susteren & Canan, P.C.
511 E Street, N.W.
Washington, D.C. 20001
(202) 393-7676

STUART A. STEINBERG, ESQUIRE
Veterans Outreach Services, Inc.
Vietnam Veterans Outreach Center
P.O. Box 747
Greenfield, MA 01302
(413) 773-3651

Attorneys for Petitioner

ALPHA GRAPHICS, INC., • WASHINGTON, D.C. • (202) 331-8101

QUESTION PRESENTED

1. Whether citizens should be barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service?

TABLES OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN R. VAN DRASEK,

Petitioner,

v.

JOHN LEHMAN,
SECRETARY OF THE NAVY,
CHAPMAN COX,
ASSISTANT SECRETARY OF THE NAVY
FOR MANPOWER AND RESERVE AFFAIRS,
AND
THE UNITED STATES OF AMERICA

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioner, John R. Van Drasek, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered on January 23, 1986.

OPINIONS BELOW

The United States Court of Appeals for the Federal Circuit affirmed the judgment of the United States District Court for the District of Columbia without written opinion but by adoption of the trial court opinion. *See* Appendix at A-1. The opinion of the trial court of December 6, 1983 is unreported and is reproduced and attached as an Appendix at A-2 to A-8. Appeal was first taken to

the United States Court of Appeals for the District of Columbia Circuit which court transferred the appeal, pursuant to 28 U.S.C. Section 1631 (1982), to the United States Court of Appeals for the Federal Circuit. *Van Drasek v. Lehman, et al.*, 762 F.2d 1065 (D.C.Cir. May 31, 1985). *See* Appendix at A-9 to A-18.

JURISDICTION

The United States Court of Appeals for the Federal Circuit entered the judgment in this case on January 23, 1986 (Appendix at A-1). Petitioner's motion for rehearing was denied on April 1, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 17 of the United States Supreme Court Rules.

STATEMENT OF THE CASE

Petitioner John Van Drasek enlisted in the United States Marine Corps in 1965 and served from 1966-68 in combat leadership positions in Vietnam, receiving the Bronze Star Medal, with Combat Distinguishing Service. *AR, Vol. IV*, pp. 199-200.[1] Petitioner came up through the ranks, always being promoted to the next highest rank in the shortest time possible, to the commission of Captain (JA 84).[2]

On June 17, 1983, petitioner, having been twice passed over for promotion to Major, instituted an action in the United States District Court for the District of Columbia challenging his involuntary discharge pursuant to 10 U.S.C. Section 632 (Appendix at A-2). His claims included that his First and Fifth Amendment rights were violated incident to complaints against his commanding officer, regarding denial of equal employment opportunity for women Marines and command influence, pursuant to Article 138 of the Uniform Code of Military Justice,

[1]"AR" refers to the Administrative Record (in four volumes) before the Board for Correction of Naval Records ("BCNR").

[2]"JA" refers to Joint Appendix in the Federal Circuit.

10 U.S.C. Section 938 ("UCMJ") (Appendix at A-2). He also claimed that his failure to be promoted was improper and retaliatory (Appendix at A-2).

From June 28, 1981 to September 28, 1982, petitioner, then Captain Van Drasek, served at the Officer Candidate School ("OCS"), Marine Corps Development and Education Command, in Quantico, Virginia, as Director of the NCO Leadership School ("NCOLS"). In October, 1981, petitioner challenged his commanding officer, Colonel M. T. Cooper's exclusion of pregnant Marines from courses at NCOLS, *AR, Vol. IV*, pp. 241-250.[3] A few weeks later, Colonel Cooper filed a fitness report (for the period June 23, 1981 to November 30, 1981) rating petitioner as "excellent" (second grade) in every observed category (Appendix at A-3). For the first time since 1974, petitioner was rated without a single mark of "outstanding" (top grade) (JA 84). Such a bright line report is commonly known among Marine Corps officers as a "killer" fitness report. *AR, Vol. IV*, p. 331. It was this fitness report which was the last entry in petitioner's Service Record Book ("SRB") and Fitness Report Brief before the April, 1982 Major selection board, which passed him over for promotion to major. This was petitioner's first promotion passover in his military career. *AR, Vol. IV*, pp. 305-307; (JA 6).

On May 18, 1982, through proposed MCDEC Order 1510.10 for the NCOLS 1982-83 academic year, petitioner formally recommended against discriminatory treatment of pregnant Marines. App. 27-28.[4] Shortly thereafter, Cooper issued a second "excellent" fitness report (for December 1, 1981 to May 31, 1982) (Appendix at A-3), which was before the second (March 1983) promotion board to pass over petitioner, ensuring his mandatory separation pursuant to 10 U.S.C. Section 632 (1980).

[3]In February 1982, Colonel Cooper ordered the OSC's *Standard Operating Procedures*, requiring use of "male candidate(s)" for parade honor billets for all but one staff position (App. 20-21). ("App." refers to the Appendix to petitioner's brief below of Pertinent Statutes and Regulations.) The order was in direct contravention of the *Marine Corps Equal Opportunity Manual*, MCO P5354.1.

[4]In response, MCDEC Order 1510.10D, App. 29-30, barring pregnant Marines from NCOLS (in violation of MCO P5354.1, *supra*, paragraph 3009), was issued on October 20, 1982. *See* paragraph 4a(4).

On July 16, 1982, petitioner, having been appointed to a six-month term on an Administrative Discharge Board ("ADB"), joined a unanimous vote in the *Frederick* case to retain a Marine despite an alleged drug abuse problem. Appendix at A-3. Without authority, Colonel Cooper removed petitioner from a case on review on August 6, 1982. Appendix at A-3. On August 10, petitioner again voted with a unanimous board in the *North* case to recommend a Marine be given an honorable discharge.

Pursuant to that vote and following a long discussion with Colonel Cooper, that same day, August 10, 1982, petitioner was ordered transferred from OCS. Although those orders were canceled, on September 18, 1982, Cooper succeeded in transferring petitioner on grounds that he was medically unfit (Appendix at A-3),[5] following petitioner's accident while parachuting, an activity authorized by Colonel Cooper. *AR, Vol. III,* p. 57. The OCS assignment was critical for promotion. *AR, Vol. IV,* pp. 252-3.

It is important to note that Colonel Cooper, in response to the later Article 138 complaint, stated that he had considered transferring petitioner due to dissatisfaction with his performance in the spring of 1982, during the ongoing conflict over treatment of women Marines (Appendix at A-4) and petitioner's rating of "excellent." *AR, Vol. IV,* pp. 37-42. It is inconsistent for Cooper to have contemplated transferring petitioner for unsatisfactory performance, unless an "excellent" rating is indeed a "killer" report.

Petitioner initiated an Article 138 Complaint of Wrongs against Colonel Cooper by letters dated September 29 and October 8, 1982 (Appendix at A-3). He alleged that Colonel Cooper had exerted improper command influence on OCS personnel with regard to their testifying on behalf of Marines who were the subjects of judicial and administrative discharge actions and with regard to their voting as members of court-martial and ADB's. He also alleged that his removal from the ADB and his transfer from OCS had been in retaliation for his part in the board's decision in the *Frederick* case (Appendix at A-3).

---

[5]This, despite the unrebutted assertion, that Cooper's subordinates who gave statements in the Article 138 investigation in support of Cooper, had equally or more serious medical problems and were allowed to remain at OCS by Cooper.

Petitioner's Article 138 complaint was investigated by Colonel Curtis G. Lawson, who issued a report dated February 28, 1983 (Appendix at A-4). Although he concluded that Colonel Cooper did not commit the wrongs alleged, in contradiction to his conclusion Colonel Lawson found that a number of officers at OCS felt that they were subject to pressure with regard to testifying and voting in court-martial and ADB proceedings (Appendix at A-4). Colonel Lawson accepted Cooper's explanation of the transfer. The Commanding General's response to the complaint and investigation was to direct that proper practices be followed in staffing discharge boards, that Cooper make clear to his subordinates the absence of improper influence on administrative and judicial actions, and that Colonel Cooper be advised of the concerns of female Marines regarding inappropriate treatment (Appendix at A-4). The Secretary of the Navy approved this disposition on May 17, 1983 (Appendix at A-4).

Petitioner was passed over for promotion in March, 1983, subjecting him to mandatory discharge on November 1, 1983, or as soon thereafter as he finished his physical disability processing. Petitioner filed an application for correction of Military or Naval Records on June 23, 1983 (JA 83) with the Board for Correction of Naval Records ("BCNR").

Petitioner instituted this action on June 17, 1983. On June 27, 1983, the parties filed a joint stipulation agreeing to stay the district court action pending pursuit of administrative remedies before the BCNR. This case was reinstated on October 31, 1983 by the district court when the BCNR denied relief to petitioner, determing, *inter alia,* that it did not have jurisdiction (JA 1), except to direct that steps be taken to locate a missing fitness report (which was missing, with another report, from the materials considered by both promotion selection boards). The BCNR refused petitioner's request that it consider correcting the records of his Article 138 complaint because they did not appear in his military personnel records (Appendix at A-4). These conclusions were reached by the BCNR despite its finding that petitioner's transfer may well have resulted from Colonel Cooper's displeasure at petitioner's voting on the ADB. The BCNR questioned Cooper's judgment and fairness (JA 23). Yet, the BCNR determined that although the transfer may have been retaliatory, no such motives were found in regard to the first contested Fitness Report. *Id.*

On December 6, 1983 the district court dismissed appellant's Article 138 claim for lack of subject matter jurisdiction, and affirmed the judgment of the Secretary of the Navy, acting through the BCNR (Appendix at A-2). Petitioner filed his appeal with the United States Court of Appeals for the District of Columbia Circuit on December 22, 1983 (JA 3).

On May 31, 1985, the United States Court of Appeals for the District of Columbia Circuit transferred this action pursuant to 28 U.S.C. Section 1631 (1982) to the United States Court of Appeals for the Federal Circuit under the authority of the Federal Courts Improvement Act, 28 U.S.C. Section 1295(a)(2) (1982). *Van Drasek v. Lehman, et al.*, 762 F.2d 1065, 1067, 1072 (D.C.Cir. 1985). On January 23, 1986, the Federal Circuit Court of Appeals affirmed the district court adopting the trial court opinion. Rehearing was denied on April 1, 1986.

REASONS FOR GRANTING THE WRIT

I. Citizens should not be barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.

This Court should grant certiorari to resolve whether a district court has the jurisdiction to review an Article 138 proceeding to determine if there have been First Amendment and Fifth Amendment due process violations. There exists a conflict among the circuits as to whether Article 138 proceedings are reviewable, as well as, what standard or test to use to make such a determination.

The courts below premised rejection of subject matter jurisdiction over Article 138 proceedings upon the finding that "...Article 138 is an internal, military mechanism for handling complaints..." (Appendix A-5) and upon "...well-established principles of the distinct role of military justice and judicial deference in matters of internal military management..." (Appendix at A-5).

In *Chappell v. Wallace*, 462 U.S. 297, 103 S.Ct. 2362, 2366 (1983), this Court made clear that Article 138 "provides for the review and remedy of complaints and grievances such as those presented by" peitioner. *Chappell v. Wallace* directed grievances

by military personnel to be presented pursuant to 10 U.S.C. Section 938 and Section 1552(a) (by Article 138 complaint and before the BCNR, respectively), while recognizing that decisions of the BCNR are subject to judicial review.

> This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service, citing *Brown v. Glines*, 444 U.S. 348 (1980); *Parker v. Levy*, 417 U.S. 733 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

103 S.Ct. at 2367. *See also, Harmon v. Brucher*, 355 U.S. 579, (1958).

Petitioner had been denied procedural and substantive review of his Article 138 complaint before the BCNR (JA 22). When the courts below also refused subject matter jurisdiction, petitioner was denied review altogether.

In *Secretary of the Navy v. Huff*, 444 U.S. 453 (1980) (per curiam), this Court, in deciding a case involving allegations of denials of First and Fifth Amendment rights to "expression," noted that:

> [R]egulations in each Armed Service were promulgated under a (DOD) directive that "Advises commanders to preserve servicemen's right to expression...to the maximum extent possible, consistent with good order and discipline and the national security." *Brown v. Glines, ante*, at 355. *A member of the service who thinks that his commander has misapplied the regulations can seek remedies within the service. See*, e.g.,...(Article 138). *Furthermore, the federal courts are open to assure that, in applying the regulations commanders do not abuse the discretion necessarily vested in them.* [Emphasis added.]

It is this assurance petitioner invokes from the federal courts.

Huff and *Chappell* make it clear that when alleging First and Fifth Amendment claims, Article 138 is the correct administrative remedy, and that Article 138 complaints are directly reviewable in federal court if the "commanders...abuse (their) discretion" by not "applying the regulations" in the manner required by law.

In *Colson v. Bradley*, 477 F.2d 639 (8th Cir. 1973), the court reversed the district court for not issuing a writ of mandamus where the plaintiff had proven that his superiors had failed to folow their own regulations in regard to investigation of complaints pursuant to Article 138. 477 F.2d at 641-2. The trial court, whose opinion was relied upon below, recognized the conflict with *Colson v. Bradley* (Appendix at A-6).

The district court relied on *Moore v. Schlesinger*, 384 F.Supp. 163 (D.Colo. 1974) (Appendix at A-5) for the proposition that the district court had no jurisdiction over the Article 138 investigation. In *Moore*, the Court ruled that there was "no statutory authority for...court review...and (Article 138 proceedings)...are expressly excluded from (APA review)...5 U.S.C. Section 701(b)(1)(F)." 384 F.Supp. at 166. These conclusions are unsupported by the Court in *Moore* by citation to any other case. Further, no other court has cited the case for this proposition and *Colson v. Bradley* holds exactly the opposite.[6]

Case law holds that the courts should abstain from intervening into a particular military decision until an "appropriate time." *Turner v. Calloway*, 371 F.Supp. 188, 192-3 (D.D.C. 1974). Two of the remedies courts have required service members to exhaust are the Article 138 Complaint and BCMR proceedings. Reviewability of BCMR proceedings has a settled case history. *Geyer v. Marsh*, 782 F.2d 1351 (5th Cir. 1986); *Powell v. Marsh*, 560 F.Supp. 636 (D.D.C. 1983); *Grieg v. United States*, 640 F.2d 1261 (Ct.Cl. 1981), *cert. denied*, 455 U.S. 907 (1982); *Heisig v. United States*, 719 F.2d 1153 (Fed.Cir. 1983). There have been cases where the service member attempted to pursue an Article 138 remedy, could not so resolve the dispute, and successfully sought review in federal court. *Turner v. Calloway, supra; MacKay v. Hoffman*, 403 F.Supp. 467 (D.D.C. 1975); *Allen v. Monger*, 404 F.Supp. 1081 (N.D.Ca. 1975); *United States ex. rel.*

---

[6]The Administrative Procedure Act ("APA") does not preclude judicial review. Although the APA provides that an agency subject to judicial review does not include "court-martial and military commissions," 5 U.S.C. Section 701(b)(1)(F), Article 138, 10 U.S.C. Section 938, *et. seq.*, as implemented by Ch. XI, Manual of the Judge Advocate General Section 1101-1114 provides for a "court of inquiry" or "board of officers," mere advisory boards. *Madsen v. Kinsella*, 343 U.S. 341, 345-7, n. 9 (1982).

Berry v. Commanding General, 411 F.2d 822 (5th Cir. 1969); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). In several cases the federal courts have simply afforded plaintiff review of a complaint without any discussion of the basis of jurisdiction. *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969); *Colson v. Bradley, supra; United States ex. rel. Gaston v. Cassidy*, 296 F.Supp. 986 (E.D.N.Y. 1969).

The most thorough test, for determining when federal courts will review military decision, which has been cited favorably by numerous jurisdictions, and from which many jurisdictions take guidance, is the *Mindes* test. *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). The *Mindes* test is very protective of military autonomy in that it requires that

> a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice remedies.

Mindes, 453 F.2d at 201. Once a plaintiff meets both of these requirements, the court must, under Mindes, "examine the substance of that allegation in light of the policy reasons behind nonreview of military matters," including: (1) the nature and strength of the plaintiff's challenge to the military determination, (2) the potential injury to the plaintiff if review is refused, (3) the type and degree of anticipated interference with the military function, and (4) the extent to which the exercise of military expertise or discretion is involved.

Petitioner has met the requirements of the *Mindes* test for judicial review of constitutional violations in the Article 138 proceedings. Petitioner has asserted that the Article 138 Complaint investigation violated the due process clause of the Fifth Amendment and that his and other's First Amendment rights were violated, as well as asserting that there have been statutory and regulatory violations. Since petitioner had exhausted his administrative remedies, he had satisfied both initial *Mindes* requirements.

The basic nature of petitioner's claims, as stated above, are important, and since they involve the Navy's own regulations and Congressional legislation protecting service members' rights, they are fully capable of supporting judicial review. Refusal to review perpetuates "command influence," retaliatory actions and has a "chilling effect" on service members' freedom of expression. A decision in petitioner's favor will mean that respondents must obey the law. Petitioner's claims are that numerous regulations and statutes promulgeted specifically for the protection of service members' rights were violated in the process of a service member invoking their protection. Finally, petitioner is not asking the courts to substitute their expertise or discretion in a peculiarly military matter, but to determine whether his claims of violations in the Article 138 investigation were correct, a task which courts are created to do. The factors in the *Mindes* test balance in favor of judicial review.

The test was used in *Wallace v. Chappell*, 661 F.2d 729 (9th Cir. 1981), which this Court reversed on other grounds, 462 U.S. 297, 103 S.Ct. 2363 (1983), with the recognition that the plaintiffs in the case had not exhausted their intraservice remedies, 103 S.Ct. at 2366. The *Mindes* test has survived the decision of *Chappell v. Wallace* in several cases. *Navas v. Gonzalez-Vales*, 752 F.2d 765 (1st Cir. 1985); *Penagaricano v. Llenza*, 747 F.2d 55 (1st Cir. 1984); *Trerice v. Pedersen*, 769 F.2d 1398 (9th Cir. 1985); *Gonzalez v. Department of the Army*, 718 F.2d 926 (9th Cir. 1983); *Williams v. Wilson*, 762 F.2d 357 (4th Cir. 1985), but cf. *Bluth v. Laird*, 435 F.2d 1065 (4th Cir. 1970) (justicability of claimed violation of military regulations assumed where intraservice administrative remedies exhausted).

The Federal Circuit, although it has not applied the *Mindes* test itself, has cited the case with approval and criticized a district court for not properly applying the test. *Maier v. Orr*, 754 F.2d 973, 984-5 (Fed. Cir. 1985). Eight circuits have accepted the test. *See*, "Judicial Review of Constitutional Claims Against the Military," 84 Col.L.Rev. 387 (March 1984). The Third Circuit rejected the *Mindes* test in *Dillard v. Brown*, 652 F.2d 316 (3rd Cir. 1981). Although the D.C. Circuit has cited *Mindes* favorably, *Vander Molen v. Stetson*, 571 F.2d 617 (D.C. Cir. 1977), the D.C. Circuit has used the more traditional approach that "(i)t is the duty of the federal courts to inquire whether an action of a

military agency conforms to the law, or is instead arbitrary, capricious, or contrary to the statutes and regulation governing that agency (citations omitted)." *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979).

Petitioner seeks review of the Article 138 proceedings in much the same way as did the petitioner in this Court's recent decision of *Lindahl v. Office of Personnel Management*, ____ U.S. ____, 105 S.Ct. 1620 (1985). In *Lindahl* this Court found that the Federal Circuit had erred in concluding that judicial review was unavailable "to determine whether 'there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination.' *Scroggins v. United States*, 184 Ct.Cl. at 534, 397 F.2d at 297." *Lindahl v. OPM, supra*, 105 S.Ct. at 1633.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

STEPHEN G. MILLKEN, ESQUIRE
Milliken, Van Susteren & Canan, P.C.
511 E Street, N.W.
Washington, D.C. 20001
(202) 393-7676

STUART A. STEINBERG, ESQUIRE
Veterans Outreach Services, Inc.
Vietnam Veterans Outreach Center
P.O. Box 747
Greenfield, MA 01302
(413) 773-3651

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to Charles R Gross, Esquire, Commercial Litigation Branch, Civil Division, United States Department of Justice, ATTN: Classification Unit, 2nd Floor, Todd Building, Washington, D.C. 20530, this _____ day of August, 1986.

STEPHEN G. MILLIKEN

APPENDIX

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL COURT

JOHN R. VAN DRASEK,	)	Appeal No. 85-2438
	)	
Appellant,	)	
	)	
v.	)	
	)	
JOHN LEHMAN,	)	
SECRETARY OF THE NAVY,	)	
	)	
Appellee.	)	

DECIDED: January 23, 1986

Before RICH, BALDWIN, and BENNETT, *Circuit Judges.*

PER CURIAM.

The decision of the United States District Court for the District of Columbia is *affirmed* on the basis of that court's December 6, 1983 opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN R. VAN DRASEK,)
)
Plaintiff,)
) Civil Action No. 83-1761
v.)
)
JOHN LEHMAN, *et al.*,)
)
Defendants.)
)

OPINION OF THE HONORABLE CHARLES R. RICHEY

Plaintiff, a Captain in the U.S. Marine Corps, having been twice passed over for promotion to Major, instituted this action challenging his involuntary discharge pursuant to 10 U.S.C. § 632. He claims that his first and fifth amendment rights were violated incident to a complaint he filed against his commanding officer pursuant to Article 138 of the Uniform Code of Military Justice, 10 U.S.C. § 938 ("UCMJ"). He also claims that his failure to be promoted was improper and retaliatory. The Court entered a temporary restraining order on October 31, 1983, prohibiting defendants from taking further action to separate plaintiff from the Marine Corps. That order was extended by agreement up to and including December 6, 1983. Defendants have now filed a motion to dismiss or, in the alternative, for judgment of affirmance, and plaintiff has responded with a memorandum in opposition and a cross-motion for judgment on the merits. For the reasons stated below, the defendants' motion is granted. Plaintiff's Article 138 claim is dismissed for lack of jurisdiction and the judgment of the Secretary of the Navy, acting through the Board for Correction of Naval Records ("BCNR"), is affirmed.

BACKGROUND

Plaintiff enlisted in the Marine Corps in 1965 and progressed steadily to the rank of captain. From June 28, 1981 to September 28, 1982, he served at the Officer Candidates School ("OCS"), Marine Corps Development and Education Command, in Quantico, Virginia, as director of the NCO Leadership School ("NCOLS"). During this entire period, Colonel M. T. Cooper served as the commanding officer of OCS and, as such, completed fitness reports on plaintiff for the periods June 23, 1981 to November 30, 1981, and December 1, 1981 to May 31, 1982. Although these reports rated plaintiff as "excellent," he did not receive top marks ("outstanding") and ranked below the other officers rated by Colonel Cooper. In April 1982, plaintiff was first considered for promotion to major but was not selected.

Plaintiff was subsequently appointed to a six-month term on an administrative discharge board by the Commanding General in July 1982. On July 16, he joined a unanimous vote for retaining a Marine in the Corps despite a drug abuse problem. Colonel Cooper, without authority from the Commanding General, removed plaintiff from a case review on August 6, but on August 10 plaintiff again voted with a unanimous board to give a different Marine an honorable discharge on drug and misconduct charges. Also on August 10, plaintiff was ordered transferred from OCS effective August 13, 1982. The transfer was cancelled after discussion between plaintiff and Colonel Cooper on August 13. Two days later, plaintiff broke his leg parachuting. He was finally transferred on September 18, 1982.

By letters dated September 29 and October 8, 1982, plaintiff initiated a complaint of wrongs against Colonel Cooper under Article 138 of the UCMJ. Plaintiff alleged that Colonel Cooper had exerted improper influence on OCS personnel with regard to their testifying on behalf of Marines who were the subject of judicial and administrative discharge actions and with regard to their voting as members of courts martial and administrative discharge boards. He also alleged that his removal from the discharge board and his transfer from OCS had been in reprisal for his part in the board's decision of July 16, 1982, to retain a Marine in the Corps.

Colonel Cooper responded that he had considered transferring plaintiff as early as the spring of 1982 due to dissatisfaction with his performance. He stated that the decision was eventually triggered by plaintiff's fractured leg because there were no available jobs at OCS for an officer on limited duty.

Plaintiff's Article 138 complaint was investigated by Colonel Curtis G. Lawson, who issued a report dated February 28, 1983. Although he concluded that Colonel Cooper did not commit the wrongs alleged, he found that a number of officers at OCS felt that they were subject to pressure with regard to testifying and voting in court-martial and administrative discharge proceedings. Colonel Lawson accepted Colonel Cooper's explanation of plaintiff's transfer. The Commanding General's response to the complaint and investigation was to direct that proper practices be followed in staffing discharge boards, that Colonel Cooper make clear to his subordinates the absence of improper influence on administrative and judicial actions, and that Colonel Cooper be advised of the concerns of female Marines regarding inappropriate treatment. The Secretary of the Navy approved this disposition on May 17, 1983.

Plaintiff was again passed over for promotion in March 1983, subjecting him to mandatory discharge on November 1, 1983, or as soon thereafter as he finished his physical disability processing. Captain Van Drasek then filed this suit in district court but the action was stayed to allow him to exhaust his administrative remedies. At the BCNR hearing on October 21, 1983, plaintiff and two other witnesses testified. The Board made its recommendation on November 7, 1983, denying plaintiff all relief except directing that steps be taken to locate a missing fitness report. It refused plaintiff's request that it consider correcting the records of plaintiff's Article 138 complaint because they did not appear in this military personnel records.

I. THIS COURT LACKS JURISDICTION TO REVIEW THE MERITS OF PLAINTIFF'S ARTICLE 138 CLAIM

Article 138 of the UCMJ, 10 U.S.C. § 938, provides:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer, exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Thus Article 138 is an internal, military mechanism for handling complaints, separate from the BCNR which is "composed of civilians appointed by the Secretary of the Navy, [and which] provides another means with which an aggrieved member of the military 'may correct any military record....' 10 U.S.C. § 1552(a)." *Chappell v. Wallace*, 103 S.Ct. 2362, 2367 (1983).

There is no statutory authority for judicial review of Article 138 proceedings, and "courts martial and military commissions" are expressly excluded from review under the Administrative Procedure Act, 5 U.S.C. § 701(b)(1)(F). Few courts have directly addressed the question of judicial review of Article 138 proceedings. *See, e.g., Cortwright v. Resor*, 447 F.2d 245 (2nd Cir. 1971); *Moore v. Schlesinger*, 384 F.Supp. 163 (D. Colo. 1974). These decisions, along with well-established principles of the distinct role of military justice and judicial deference in matters of internal military management, lead this court to conclude that it cannot reexamine the substance of the Article 138 decision.

> [J]udges are not given the task of running the Army. The responsibility for setting up channels through which...grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Orloff v. Willoughby, 345 U.S. 83, 93-94 (1955).

This fundamental reluctance to intrude on military decisionmaking, as a matter of judicial prudence if not always judicial power, is illustrated by a number of recent Supreme Court cases. *See Chappell v. Willoughby*, 103 S.Ct. 2362 (1983); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Parker v. Levy*, 417 U.S. 733 (1974); *Gilligan v. Morton*, 413 U.S. 1 (1973). The general policy of deference is particularly appropriate in the context of Article 138 complaints:

> Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.

Chappell, 103 S.Ct. at 2365.*

This is not to say that military personnel may be "stripped of basic rights simply because they have doffed their civilian clothes." E. Warren, *The Bill of Rights & the Military*, 37 N.Y.U.L. Rev. 181, 188 (1962). *See also Chappell*, 103 S.Ct. at 2367-68; *Parker*, 417 U.S. at 758. Civilian courts have the power to oversee certain aspects of the military justice system,

> [b]ut implicit in the congressional scheme embodied in the Code [of Military Justice] is the view that the military court system generally is adequate to and responsibly perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights.

Schlesinger, 420 U.S. at 758. In this case, the Court finds that the processing of plaintiff's Article 138 complaint comports with constitutional requirements. The investigation, report of findings, and remedial action satisfy the minimum standards of procedural due process. Plaintiff's allegations of first amendment violations similarly do not warrant relief. *See Parker*, 417 U.S. at 758. *Cf. Colson v. Bradley*, 477 F.2d 639, 641 (8th Cir. 1973) (mandamus remedy appropriate where a superior officer fails to fulfill his duty to investigate).

II. THE BCNR DECISION WAS NOT ARBITRARY OR CAPRICIOUS

BCNR decisions can be set aside by a court only "if they are arbitrary, capricious or not based on substantial evidence." *Chappell*, 103 S.Ct. at 2367. *See also deCicco v. United States*, 677 F.2d 66, 70 (Ct.Cl. 1982); *Grieg v. United States*, 640 F.2d 1261, 1268 (Ct.Cl. 1981), *cert. denied*, 455 U.S. 907 (1982); *Powell v. Marsh*, 560 F.Supp. 636, 641 (D.D.C. 1983) Review must proceed with due regard for the "strong policies [that] compel the court to allow the widest possible latitude to the armed services in their administration of personnel matters." *Sanders v. United States*, 594 F.2d 804, 814 (Ct.Cl. 1979). The Board's decision in Captain Van Drasek's case is supported by substantial evidence and must, therefore, be affirmed.

The Board submitted an eleven-page, single-spaced typewritten report to the Secretary of the Navy on November 7, 1983. It carefully addressed plaintiff's complaints both as to the accuracy of his fitness reports and as to the correctness and fairness of his failures of selection for promotion. With regard to the fitness reports, the BCNR noted that plaintiff received "excellent" ratings and that there were no unfavorable narrative comments. Further, the Board determined that the contested reports were not aberrant when compared with the rest of plaintiff's records. Of particular importance is the fact that the contested reports could *not* have been influenced by Captain Van Drasek's dispute with Colonel Cooper over his votes while serving on the administrative discharge board because they *predated* his appointment.

The Board also found that plaintiff's record before both promotion selection boards was substantially complete. It was not persuaded by the evidence that the 1983 selection board was even award of Captain Van Drasek's Article 138 complaint, "much less that the board improperly held against him the fact that he exercised his rights..." The BCNR rejected plaintiff's claim that his record was so good that his failure to be promoted must have been on improper considerations. The Court has determined that these findings are reasonable and supported by substantial evidence.

CONCLUSION

For the reasons stated above, the Court affirms the judgment of the Secretary of the Navy and will enter an order accordingly of even date herewith dismissing the case.

December 6, 1983 — /s/ Charles R. Richey

Charles R. Richey
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2343

JOHN R. VAN DRASEK, CAPTAIN, APPELLANT

v.

JOHN LEHMAN, Secretary of the Navy, *et al.*

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 83-1761)

Argued October 16, 1984

Decided May 31, 1985

Stuart Steinberg, with whom *Stephen G. Milliken* was on the brief, for appellant.

Michael J. Ryan, Assistant United States Attorney, with whom *Joseph E. diGenova*, United States Attorney, *R. Craig Lawrence*, *William J. Birney*, *Royce C. Lamberth*, Assistant United States Attorneys, and *Charles R. Gross*, Captain, Office of the Judge Advocate General, Department of the Navy, were on the brief, for appellees.

Before TAMM, MIKVA, and EDWARDS, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge:* The Federal Courts Improvement Act, 28 U.S.C. § 1295(a)(2) (1982), provides that the United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction over appeals from final decisions of a district court if the jurisdiction of that court was based "in whole or in part" on the Tucker Act, 28 U.S.C. § 1346(a)(2) (1982). Although neither party in this case raised the issue of this court's appellate jurisdiction, we find that appellant's action against the United States was based in part on the Tucker Act and that jurisdiction over the appeal therefore lies in the Federal Circuit. Accordingly, we transfer the case pursuant to 28 U.S.C. § 1631 (1982).

I. BACKGROUND

John Van Drasek enlisted in the United States Marine Corps in 1965 and progressed steadily to the rank of captain. In April 1982 and March 1983, the Marine Selection Board passed over Captain Van Drasek for promotion to major, subjecting him to mandatory dismissal from the military pursuant to 10 U.S.C. § 632 (1982). Because he believed the decisions denying him promotion were unfairly and unlawfully based on evaluations from a superior officer with whom he had several conflicts, Van Drasek petitioned the Board for the Correction of Naval Records (BCNR) to void his superior's evaluation and order the Selection Board to reconsider his promotion to major.

After exhausting his administrative remedies without success, Van Drasek sued in the district court, claiming that his constitutional and statutory rights had been violated and the BCNR had arbitrarily refused to order his reconsideration. Van Drasek also sought $9,999 in back pay. The district court denied all relief, and this appeal followed.

II. DISCUSSION

A.

The Federal Courts Improvement Act, 28 U.S.C. § 1295(a)(2), provides that the United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of appeals from final

decisions of district courts "if the jurisdiction of that court was based, in whole or in part," on 28 U.S.C. § 1346(a)(2), the Tucker Act.[1] Section 1346(a)(2) gives district courts concurrent jurisdiction with the Claims Court over "[a]ny . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department. . . ."

Captain Van Drasek's original complaint requested, *inter alia,* "a Writ of Mandamus ordering the Defendants to award all back pay and other benefits to which Plaintiff would be entitled had he been promoted when originally considered, if Plaintiff is found qualified and is, in fact, promoted to the rank of Major." Complaint at 42-43 (filed November 1, 1983). Recognizing a possible problem with jurisdiction over the back pay claim, United States District Judge Charles R. Richey asked the parties whether Van Drasek's claims for monetary relief should be heard by the Claims Court. In response, Van Drasek amended his complaint to waive all back pay in excess of $9,999.99. Amended Complaint at 50-51 (filed November 10, 1983). In a footnote to this claim for back pay, Van Drasek cited *Vander Molen v. Stetson,* 571 F.2d 617 (D.C. Cir. 1977), a case which held that by waiving recovery in excess of $10,000, a plaintiff could bring suit in the district court under the Tucker Act, 28 U.S.C. § 1346(a)(2). Judge Richey rejected Van Drasek's claim on the merits, finding that the BCNR acted reasonably in denying his reconsideration for promotion to major.

B.

The plain language of the Federal Courts Improvement Act directs our attention not to the claims advanced on appeal but to the basis of the district court's original subject matter

---

[1] The Tucker Act consists of 28 U.S.C. § 1491, which sets out the jurisdiction of the Claims Court, and § 1346(a)(2), which gives concurrent jurisdiction to the district courts for claims not exceeding $10,000. The Federal Circuit affectionately refers to the latter section as the "Little Tucker Act." *See e.g.* Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1575 n.15 (Fed. Cir. 1984).

jurisdiction.[2] If the plaintiff makes any claim that invokes the jurisdiction of the district court under the Tucker Act, the entire case must be appealed to the Federal Circuit. *See* 28 U.S.C. § 1295(a)(2) (Federal Circuit has exclusive appellate jurisdiction if jurisdiction of the district court "was based, in whole *or in part*," on the Tucker Act (emphasis added)). As explained in greater detail below, for a claim in the district court to be based on the Tucker Act, it must (1) seek money (2) not exceeding $10,000 (3) from the United States and (4) be founded either upon a contract or upon a provision of the "the Constitution, or any Act of Congress, or any regulation of an executive department," 28 U.S.C. § 1346(a)(2), that "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 103 S.Ct. 2961, 2968 (1983). If any of these requirements are *not* met, the claim falls outside the scope of the Tucker Act, and this court would retain appellate jurisdiction over the entire case.

1. *Money Claim.*

For reasons not germane to this appeal, the Supreme Court has limited the scope of the Tucker Act to claims for money. *See United States v. King*, 395 U.S. 1, 2-3 (1969). Although consent to suit is necessary for monetary and non-monetary claims alike, the Tucker Act is not implicated when the plaintiff seeks only declaratory and injunctive relief. In *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), for example, this court heard an appeal of an officer who alleged that the Navy had unconstitutionally discharged him for engaging in homosexual conduct. Dronenburg, like Van Drasek, originally sought

---

[2]Although neither Van Drasek nor the government raise the issue of this court's appellate jurisdiction, our duty to consider it *sua sponte* is well established. *See* City of Kenosha v. Bruno, 412 U.S. 507, 511-14 (1973). Since the enactment of the Federal Courts Improvement Act in 1982, we have received an increasing number of cases that should have been filed with the Federal Circuit. While we usually dispose of these cases by unpublished orders transferring the appeals to the Federal Circuit, *see e.g.*, Corwin v. Lehman, 724 F.2d 1577 (Fed. Cir.), *cert. denied*, 104 S.Ct. 2680 (1984); Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983), we issue a published opinion in this case to alert counsel, especially those who regularly defend actions against the United States, to the impact of the Federal Courts Improvement Act upon our appellate jurisdiction.

reinstatement and money damages. Dronenburg, however, amended his complaint to eliminate any claim for money, leaving only claims for injunctive and declaratory relief. *Id.* at 1390 n.2. This court found that 5 U.S.C. § 702 (1982) waived sovereign immunity for Dronenburg's non-monetary claims,[3] thereby permitting suit against the United States in the district court under the general federal question statute, 28 U.S.C. § 1331 (1982).[4] Since Dronenburg made no claim for money damages, the jurisdiction of the district court could not have been based on the Tucker Act. This court's appellate jurisdiction was thus unaffected by the Federal Courts Improvement Act.[5] *See Jones v. Alexander*, 609 F.2d 778 (5th Cir.) (Tucker Act irrelevant where plaintiff waived all actual damages and sought mandamus to prevent his release from active duty and for correction of his military records), *cert. denied*, 449 U.S. 832 (1980). *See also Blevins v. Orr*, 721 F.2d 1419 (D.C. Cir. 1983) (affirming dismissal on the merits of claim by former Air Force officer for retroactive promotion but no back pay); *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978) (vacating and remanding dismissal of claims by former airman for declaratory and injunctive relief).

---

[3]Section 702, as amended in 1976, states that an "action in a court of the United States seeking relief other that [sic] money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States." 5 U.S.C. § 702 (1982). As the court's discussion in *Dronenburg* suggests, even before section 702 was amended to explicitly waive sovereign immunity for non-monetary claims against the United States, sovereign immunity was no bar to federal employees seeking reinstatement from an unlawful discharge. *See e.g.*, Service v. Dules, 354 U.S. 363 (1957).

[4]Under *Dronenburg*, therefore, a district court has jurisdiction over a non-monetary claim even though the same facts giving rise to the non-monetary claim would support an action for money in the Claims Court. *Accord*, Hahn v. United States, 757 F.2d 581, 588-89 (3d Cir. 1985). *See also* Greene v. McElroy, 360 U.S. 474 (1959).

[5]Although the appeal in *Dronenburg* was filed after the effective date of the Federal Courts Improvement Act, the court did not address the Tucker Act issue in terms of its own jurisdiction. By finding that the Tucker Act did not preclude the district court from exercising jurisdiction, however, the court in essence completed the inquiry into its own jurisdiction.

2. *Not in Excess of $10,000.*

The district court's jurisdiction under the Tucker Act is limited to claims not exceeding $10,000. 28 U.S.C. § 1346(a)(2). In *Doe v. United States Department of Justice*, 753 F.2d 1092 (D.C. Cir. 1985), for example, this court considered and rejected the argument that the Federal Circuit had exclusive jurisdiction over an appeal from the district court. Doe formerly an attorney for the Department of Justice, filed suit against the United States and individual defendants seeking reinstatement and back pay. On apeal, this court concluded that, although Doe did not specify the amount of the back pay sought, it must have been in excess of $10,000. Since the Tucker Act grants concurrent jurisdiction to the district court only in claims for less than $10,000, we concluded that the district court had no jurisdiction to adjudicate the back pay claim. Because it did not have jurisdiction to hear the back pay claim, the jurisdiction of the district court could not have been based, even in part, on the Tucker Act. We therefore properly exercised appellate jurisdiction over the case. *Id.* at 1101-02. *See also Hahn v. United States*, 757 F.2d 581, 587 n.3 (3d Cir. 1985)[6]

3. *Against the United States.*

The Tucker Act by its terms is limited to suits against the United States. Even if the United States is not a named defendant, however, "if 'the judgment sought would expend itself on the public treasury,'" the suit will be construed as one against the United States requiring a waiver or sovereign immunity. *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citations omitted). *See also Hill v. United States*, 571 F.2d 1098, 1101 n.5 (9th Cir. 1978) (since the back pay airman demanded would come from the

[6]In *Hahn*, the district court awarded the class action plaintiffs declaratory, injunctive, and an unspecified amount of monetary relief. The court of appeals reversed, finding that since the plaintiffs failed effectively to waive damages in excess of $10,000, the district court did not have jurisdiction over the monetary claim. The court remanded the monetary claims, granting the plaintiffs leave to amend their complaint to waive damages in excess of $10,000 and proceed in the district court or to take their monetary claims to the Claims Court. 757 F.2d at 587-88. As in *Doe*, the court in *Hahn* retained appellate jurisdiction over the entire case because the plaintiffs made no claim that fell within § 1346(a)(2).

federal treasury, suit must be construed as one against the United States). *Cf. Industrial Indemnity, Inc. v. Landrieu*, 615 F.2d 644 (5th Cir. 1980) (district court had jurisdiction over suit to recover construction retainages withheld because judgment would be satisfied from a specific fund within the control of HUD and not from the federal treasury). On the other hand, suits brought against a federal official in his individual capacity for violations of a plaintiff's constitutional rights are not suits that require the consent of the United States, and the Tucker Act is not implicated. *See, e.g., Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See generally* 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3655 (1985).

Substantive Right to Compensation.

Although it waives sovereign immunity, the Tucker Act "'"does not create any substantive right enforceable against the United States for money damages."'" *United States v. Mitchell*, 103 S.Ct. 2961, 2968 (1983) (citations omitted). Thus, for a claim to be based on the Tucker Act, it must be founded either upon a contract or upon a provision in "the Constitution, or any Act of Congress, or any regulation of an executive department," 28 U.S.C. § 1346(a)(2), that "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Mitchell*, 103 S.Ct. at 2968.[7]

In *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), for example, the plaintiff sought to base his money claim against the United States on the government's violation of his first

[7]*Mitchell* makes clear that the existence of a substantive right to recovery against the United States is a *jurisdictional* prerequisite to suit under the Tucker Act. In *Mitchell*, the claimants sued under the "Indian Tucker Act," 28 U.S.C. § 1505, seeking money damages for alleged breaches of trust in connection with the United States' management of forest reserves on an Indian reservation. The issue in the case was whether various statutes governing the management of Indian timber could fairly be interpreted as creating a substantive right to recovery. Having found such a substantive right, the Court concluded that the "Claims Court therefore has jurisdiction over respondents' claims." 103 S.Ct. at 2974. *But see* Hahn v. United States, 757 F.2d 581, 588 n.4 (3d Cir. 1985) (dicta) (existence of a substantive right to recovery is not a jurisdictional matter).

amendment rights. The court found that the taking clause of the fifth amendment is the only provision of the Constitution that can fairly be interpreted as mandating compensation; the first amendment, therefore, does not provide a basis for any substantive right to compensation from the federal government under the Tucker Act. *Id.* at 103 n.31. Clark's claim, therefore, was insufficient to invoke the jurisdiction of the district court under the Tucker Act, *id.*, and this court properly retained appellate jurisdiction over the entire case.[8]

In sum, if any of the plaintiff's claims meets the four requirements set out above, the jurisdiction of the district court is based in part on the Tucker Act, and appellate jurisdiction over the entire case lies in the Federal Circuit. To this general rule, we recognize two limited exceptions. First, in extraordinary circumstances the sheer frivolity of the plaintiff's Tucker Act claim on the merits may be sufficient to deprive the district court of jurisdiction under the Tucker Act. *See Healy v. Sea Gull Specialty Co.*, 237 U.S. 479 (1915).[9] Second, a claim may be brought under statutes that independently confer jurisdiction upon the district court and waive sovereign immunity for money claims against the United States. Such a claim, although falling within the scope of the Tucker Act, will not be deemed to be "based on" the Tucker Act for the purposes of determining appellate jurisdiction.[10]

---

[8]In Hostetter v. United States, 739 F.2d 983, 985 (4th Cir. 1984), the court expressly declined to decide whether the district court's jurisdiction could have been based on the Tucker Act because it found that since the discharged employee was not entitled to reinstatement on the merits, no pay would be due in any event. Under our analysis, such ambivalence toward the original basis of the district court's jurisdiction does not comport with the mandate of the Federal Court Improvement Act.

[9]Under the Federal Courts Improvement Act, the Fedeal Circuit also has exclusive appellate jurisdiction over appeals from final decisions of a district court if the jurisdiction of the district court was based on 28 U.S.C. § 1338(a), which provides that the district courts shall have jurisdiction over civil actions relating to patents. The Senate Report to this provision states that "immaterial, inferential, and frivolous allegations of patent questions will not create jurisdiction in the lower court," and therefore not in the Federal Circuit. S. REP. NO. 275, 97th Cong., 1st Sess. 20 (1981), *reprinted in* 1982 U.S. Code Cong. & Ad. News 30.

[10]The textual statement conflicts with language found in many cases suggesting that the Claims Court's jurisdiction is exclusive over claims that fall within the Tucker Act. As the court stated in Graham v. Henegar, 640 F.2d 732, 734 (5th Cir. 1981), "courts confronting the issue have consistently held that the

Although neither the district court's memorandum opinion nor the briefs filed in this appeal explicitly address Van Drasek's claim for back pay, we find inescapable the conclusion that Van Drasek's suit in the district court was based in part on the Tucker Act. Van Drasek's amended complaint expressly seeks money not

---

Court of Claims is the sole forum for the adjudication of such a claim, even though the claim would otherwise fall within the coverage of some other statute conferring jurisdiction on the district court." (citing cases). Indeed, there seems to be some confusion in this circuit. *Compare* Doe v. United States Dep't of Justice, 753 F.2d 1092, 1101 (D.C. Cir. 1985) ("Jurisdiction for those monetary claims against the United States exceeding $10,000 lies exclusively with the Claims Court.") *with* Trans-Bay Engineers & Builders, Inc. v. Hills, 551 F.2d 370, 376-77 (D.C. Cir. 1976) (Tucker Act does not bar suit in the district court for claims against the United States exceeding $10,000 because the National Housing Act, 12 U.S.C. § 1702, waives sovereign immunity, and 28 U.S.C. § 1331 provides subject matter jurisdiction).

Upon close analysis, this conflict is more apparent than real. As the court stated in Ghent v. Lynn, 392 F.Supp. 879, 881 (D. Conn. 1975), "[i]n fact, the jurisdiction for the Court of Claims for suits claiming more than $10,000 is not exclusive; rather, there is rarely any statute available that waives sovereign immunity for suits in the district court, other than the Tucker Act with its $10,000 limit" The proper inquiry, then, is whether the statute or statutes relied upon by the plaintiff manifest a congressional intent to consent to suits for money claims against the United States in the district courts notwithstanding the limitations found in the Tucker Act.

In Munoz v. Small Business Administration, 644 F.2d 1361 (9th Cir. 1981), for example, the Ninth Circuit held that the district court had jurisdiction over money claims exceeding $10,000 against the Small Business Administration under 15 U.S.C. § 634(b)(1), which states that the administrator of the SBA may sue and be sued in district court without regard to the amount in controversy. Similarly, we held in National Treasury Employees Union v. Campbell, 589 F.2d 669 (D.C. Cir. 1978), that the district court had jurisdiction over damages claims under 5 U.S.C. § 8912, which provides that the "district courts of the United States have original jurisdiction, concurrent with the Court of Claims, of a civil action or claim against the United States founded on this chapter." *See also Fegruson v. Union National Bank*, 126 F.2d 753, 756-57 (4th Cir. 1942) (12 U.S.C. § 1702 not only waives sovereign immunity but also confers subject matter jurisdiction in the federal courts). *Cf.* Portsmouth Redevelopment & Housting Authority v. Pierce, 706 F.2d 471, 475 (4th Cir.). (42 U.S.C. § 1404a, another "sue and be sued" statute, does not give district courts jurisdiction over money claims falling thereunder because, unlike 12 U.S.C. § 1702, it does not contain the critical language "in any court of competent jurisdiction, State or Federal"), *cert. denied*, 104 S.Ct. 392 (1983).

exceeding $10,000 from the United States.[11] Van Drasek's substantive right to compensation is founded upon an Act of Congress, 10 U.S.C. § 1552, which authorizes boards for the correction of military records to award back pay. *See Sanders v. United States,* 594 F.2d 804, 808-11 n.11 (Ct.Cl. 1979), *cited with approval in Chappell v. Wallace,* 103 S.Ct. 2382 (1983). Van Drasek's claim for monetary relief is far from frivolous. Finally, no statute other than the Tucker Act waives sovereign immunity for the relief Van Drasek's seeks. The jurisdiction of the district court was therefore based albeit only in part, on the Tucker Act.[12]

III. CONCLUSION

By basing appellate jurisdiction on the original jurisdiction of the district court, the Federal Courts Improvement Act introduces yet another twist to the already unnecessarily complex law of federal court jurisdiction. The burden of wading through this jurisdictional quagmire outweighs, we think, the limited utility of providing uniform adjudication of such relatively small money claims against the United States. Until Congress sees fit to revisit the issue, however, we cannot ignore the mandate of the Act. We therefore transfer this case to the Federal Circuit pursuant to 28 U.S.C. § 1631.

So ordered.

---

[11]That Van Drasek's claim for back pay is framed within a request for a writ of mandamus in no way affects this finding. Jurisdiction under the Tucker Act cannot be avoided by so disguising a money claim. *See* Portsmouth Redevelopment & Housting Authority v. Pierce, 706 F.2d 471, 474 (4th Cir.) ("Claims Court jurisdiction cannot be avoided by framing an essentially monetary claim in injunctive or declaratory terms"), *cert. denied,* 104 S.Ct. 392 (1983).

[12]This decision is in accord with recent cases that this court has transferred, by unpublished order, to the Federal Circuit. In Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983), the plaintiff challenged a decision of the Army Board for Correction of Military Records in the district court. Like Van Drasek, Heisig preserved jurisdiction in the district court by waiving any recovery in excess of $10,000. *Id.* at 1156 n.8. After the district court denied all relief, Heisig appealed to this court, and we transferred the appeal to the Federal Circuit. Similarly, in Corwin v. Lehman, 724 F.2d 1577 (Fed. Cir.), *cert. denied,* 104 S.Ct. 2680 (1984), Naval Reserve officers challenged in the district court their involuntary transfers, requesting declaratory and injunctive relief as well as damages. The appeal from the district court's dismissal was originally lodged in this court. Upon an unopposed motion by the government, however, this court transferred the appeal to the Federal Circuit. *Id.* at 1578. *See also* Maier v. Orr, 754 F.2d 973 (Fed. Cir. 1985) (military back pay claim for under $10,000 appealed from District Court for the District of Hawaii to Federal Circuit).

No. 86-319

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN R. VAN DRASEK, PETITIONER

v.

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-319

JOHN R. VAN DRASEK, PETITIONER

v.

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the district court, affirmed by the court of appeals, improperly refused to hear his complaint that the United States Navy denied him and others their First and Fifth Amendment rights in connection with his complaint against his commanding officer, filed pursuant to Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938.

1. a. In April 1982 petitioner, then a Captain in the United States Marine Corps, was passed over for promotion to Major. In September and October 1982, he filed a complaint against his commanding officer under Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938.[1] The complaint charged that petitioner had been

---

[1]Article 138 provides:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any

improperly transferred from one post to another and improperly removed from a six-month service assignment on an administrative discharge board. It asserted that petitioner's transfer and removal were in retaliation for the way he had voted during his tenure on the discharge board. The complaint also alleged that improper command influence had been exerted by his commanding officer on other military personnel with regard to how they voted while on court-martial and administrative discharge boards and with regard to how they testified in judicial and administrative discharge actions. Pet. App. A3.

b. The Commanding General appointed Colonel Curtis G. Lawson to investigate petitioner's complaint against his commanding officer (C.A. App. 49-50). Colonel Lawson's report concluded that the commanding officer did not commit the wrongs alleged but that some officers did feel subject to pressure with regard to testifying and voting in court-martial and administrative discharge proceedings. Colonel Lawson accepted the commanding officer's reasons for petitioner's transfer, which included dissatisfaction with his performance. Pet. App. A4. The Commanding General's response to the complaint and investigation was, inter alia, to direct that proper practices be followed in staffing discharge boards and that petitioner's commanding officer make clear to his subordinates that there would be no improper influence on administrative or judicial actions. *Ibid.*

---

superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

This disposition was reviewed by the Office of the Judge Advocate General of the Navy and approved by the Secretary of the Navy (Pet. App. A4; C.A. App. 81-82).

c. Petitioner asked the Board for the Correction of Naval Records (BCNR) to "[m]ake certain revisions of the record of proceedings regarding [the Article 138] complaint * * * or cause a new investigation of the complaint to be conducted" (C.A. App. 15). He also asked the BCNR to review his failure to be promoted in April 1982 and a second pass-over in March 1983 (*id.* at 14-15, 18, 23). The BCNR determined, with respect to the Article 138 complaint, that " 'this request * * * is beyond the scope of corrections traditionally made by the Board' " (*id.* at 15), and "particularly note[d] that this record of proceedings does not appear in [p]etitioner's military personnel record" (*id.* at 22). The BCNR found no unfairness in the failure to promote petitioner (*id.* at 23).

d. When petitioner was passed over for promotion a second time, this automatically subjected him to mandatory discharge (C.A. App. 18). Petitioner filed a complaint in the United States District Court for the District of Columbia, challenging the anticipated discharge. He claimed "that his first and fifth amendment rights were violated incident to [his Article 138 complaint]" and that his failure to be promoted was improper and retaliatory (Pet. App. A2). The district court dismissed petitioner's Article 138 claim for lack of jurisdiction (*ibid.*), finding as it did so that "the processing of [petitioner's] Article 138 complaint comports with constitutional requirements" (*id.* at A6). The court affirmed the BCNR's determination with respect to petitioner's promotions as based on substantial evidence (*id.* at A7).

e. Petitioner appealed to the District of Columbia Circuit, which ruled that under the Federal Courts Improvement Act, 28 U.S.C. 1295(a)(2), jurisdiction to hear the appeal lay exclusively with the Federal Circuit (Pet. App.

A9-A18). Accordingly, the appeal was transferred to that court pursuant to 28 U.S.C. 1631 (Pet. App. A18). The Federal Circuit affirmed summarily on the basis of the district court's opinion (*id.* at A1).

2. Petitioner raises no issue that merits this Court's attention, and the unpublished Federal Circuit and district court decisions were correct.

Petitioner does not appear to challenge the BCNR's decision sustaining the denial of his promotion to major, or its "deni[al][of] procedural and substantive review of his Article 138 complaint" (Pet. 7). The sole question presented by the petition for a writ of certiorari is whether the district court erred in its disposition of his Article 138 claim.

a. The district court correctly dismissed, for want of jurisdiction, petitioner's request that the district court review the Article 138 proceeding. As the district court explained, there is no statutory authority for judicial review of such internal military proceedings. Pet. App. A5-A6. Petitioner cites no case in which a court undertook review of an Article 138 proceeding, and we are aware of none. See, *e.g.*, *Mollnow* v. *Carlton*, 716 F.2d 627, 629 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984); Cortright v. *Resor*, 447 F.2d 245, 253 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972) (Friendly, J.) ("We do not sit as a super-Judge Advocate General to review determinations under [Article 138]" (citation omitted)).[2]

b. While declining to review the Article 138 proceeding generally, the district court *did* in fact review the proceeding for constitutional violations, but found none. It found, rather, that "the processing of [petitioner's] Article 138

[2]In *Colson* v. *Bradley*, 477 F.2d 639 (8th Cir. 1973), and *Schatten* v. *United States*, 419 F.2d 187 (6th Cir. 1969), the military was ordered to *conduct* an Article 138 proceeding; here, petitioner wants the completed proceeding *reviewed*. See *Ayala* v. *United States*, 624 F. Supp. 259, 262-263 (S.D.N.Y. 1985).

complaint comports with constitutional requirements" (Pet. App. A6). The court explained that "[t]he [Article 138] investigation, report of findings, and remedial action satisfy the minimum standards of procedural due process" and that petitioner's "allegations of first amendment violations similarly do not warrant relief" (*ibid.* (citations omitted)).[3]

c. Finally, the district court's finding that there were no constitutional defects in the Article 138 proceeding was correct. Petitioner's First Amendment claim that his right to free expression was chilled by his commanding officer's improper evaluation and transfer of him is insubstantial as both a factual and a legal matter and does not present the extraordinary circumstances necessary to justify judicial intervention into military matters. Cf. *Parker* v. *Levy*, 417 U.S. 733, 758 (1974); *Cortright* v. *Resor*, 447 F.2d at 254-255. Regarding his claim that the First Amendment rights of third parties were violated by improper command influence, petitioner has no standing (see, *e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 499-502 (1975)), and, in any event, he was not entitled to use an Article 138 proceeding for such a third-party challenge (see *Turner* v. *Callaway*, 371 F. Supp. 188, 190 (D.D.C. 1974); Gov't App. Br. 40, 43 (discussing relevant regulations)). Petitioner also claimed below that the Article 138 proceedings violated his right to due process, but this assertion also has no merit. The Article 138 charge was fully investigated: the Commanding General appointed an investigator who made balanced findings; the Commanding General's disposition of the complaint reflected those findings; and this disposition was in turn reviewed by the Office of the Judge Advocate General of the Navy and approved by the Secretary of the Navy.

[3]Petitioner concedes that "[t]he Federal Circuit, although it has not applied [petitioner's proposed standard of review] itself, has cited [it] with approval and criticized a district court for not properly applying the test" (Pet. 10 (citation omitted)).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

NO. 86-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN R. VAN DRASEK,

Petitioner,

v.

JOHN LEHMAN,
SECRETARY OF THE NAVY,
CHAPMAN COX,
ASSISTANT SECRETARY OF THE NAVY
FOR MANPOWER AND RESERVE AFFAIRS,
AND
THE UNITED STATES OF AMERICA

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

STEPHEN G. MILLIKEN, ESQUIRE
Milliken, Van Susteren & Canan, P.C.
511 E Street, N.W.
Washington, D.C. 20001
(202) 393-7676

STUART A. STEINBERG, ESQUIRE
Veterans Outreach Services, Inc.
50 Federal Street
P.O. Box 747
Greenfield, MA 01302
(413) 773-3651

Counsel for Petitioner

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

Counsel for Respondents

Petition for Certiorari filed August 28, 1986
Certiorari Granted December 1, 1986

ALPHA GRAPHICS, INC. • WASHINGTON, D.C. • (202) 331-8101

TABLE OF CONTENTS

NOTATION REGARDING ITEMS ALREADY REPRODUCED

The following opinions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for a Writ of Certiorari:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 83-1761

JOHN R. VAN DRASEK,
Plaintiff,

v,

JOHN LEHMAN, *et al.*
Defendants.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1983	
June 17	COMPLAINT: appearance; attachments.
June 17	APPLICATION by pltf. for temporary restraining order.
June 17	MOTION by pltf. for preliminary injunction, declaratory relief and mandamus.
June 17	MEMORANDUM by pltf. of points and authorities in support of pltf.'s application for temporary restraining order and motion for preliminary injunction, declaratory relief, and mandamus.
June 17	APPLICATION of pltf. for a TRO begun; respited to 6-20-83, 3:00 p.m. (Rep: E. Olsen) PARKER, J.
June 20	APPLICATION of pltf. for a TRO resumed. Pltf. agrees to withdraw his application for a TRO & motion for preliminary injunction so that the case may be remanded. A stipulation shall be submitted to chambers by 6-22-83. (Rep: E. Olsen) PARKER, J.

June 20 AFFIDAVIT of Mr. W. Dean Pfeiffer submitted by defts.

June 20 AFFIDAVIT of Mr. William R. Wright, attachment, submitted by defts.

June 20 MEMORANDUM by pltf. of points and authorities in opposition to review of denial of pltf's complaint pursuant to article 138, U.C.M.J. (1969), 10 U.S.C. 938 (1976), at the board for correction of naval records.

June 27 JOINT STIP''LATION withdrawing pltf.'s application for TRO and motion for preliminary injunction; pltf, consents to stay proceedings pending pursuit of his administrative remedies before BCNR; should either party fail to carry out its part of this agreement in whole or in part, the other party may apply to this Court for enforcement of this agreement; approved and so ordered. (fiat) (N) (signed 6-25-83) PARKER, J.

Sept. 8 ORDER filed 8-31-83 dismissing action with Pltf. having leave to reapply to have his case reinstated after the exhaustion of his administrative remedies. (N) RICHEY, J.

Oct. 31 MOTION by pltf for reinstatement; P&A's; affidavit of counsel regarding procedural history and attempts to exhaust administrative remedies, and in support of motion to reinstate verified complaint for temporary restraining order, injunctive relief, declaratory judgment and mandamus.

Oct. 31 STATUS CALL: Court reinstates case; Motion of Pltf. for TRO heard and granted; Pltf. to post bond (surety) in the amount of $250.00. (Rep: G. Slodysko) RICHEY, J.

Oct. 31 ORDER filed reinstating case. (N) RICHEY, J.

Oct. 31 TEMPORARY RESTRAINING ORDER; pltf. to post a cash bond of $250.00. (signed 4:45 P.M.) (N) RICHEY, J.

Nov. 1 DEPOSIT by Pltf. for security of costs in the sum of Two Hundred Fifty Dollars ($250.00).

Nov. 1 COMPLAINT (Verified) by Pltf.

Nov. 1 APPLICATION by Pltf. for temporary restraining order.

Nov. 1 MOTION by Pltf. for preliminary injunction, declaratory relief and Mandamus.

Nov. 1 MEMORANDUM by Pltf. of points and authorities in support of Pltf.'s application for temporary restraining order and motion for preliminary injunction, declaratory relief, and mandamus.

Nov. 2 NOTICE by Defts. of filing the attached memorandum for the Secretary of the Navy dated 10-18-83; Attachment.

Nov. 8 MEMORANDUM of points and authorities of pltf in response to the honorable court's query as to whether pltf's claims for equitable and monetary relief should be jointly heard by the United States Claims Court or this Court, or whether each Court must take cognizance of that portion of pltf's claims over which they have exclusive jurisdiction.

Nov. 10 AMENDED VERIFIED COMPLAINT by Pltf.

Nov. 10 STATUS REPORT by Defts.

Nov. 15 STIPULATION filed 11-10-83 extending Temporary Restraining Order to 12-6-83; Directing that Defts. will file a dispositive motion on 11-21-83; Directing Pltf. to respond on 11-28-83, so ordered. (fiat)(N) RICHEY, J.

Nov. 17 TRANSCRIPT OF PROCEEDINGS, 6-17-83, pp. 24. (Rep: M. E. Olsen)

Nov. 17 TRANSCRIPT OF PROCEEDINGS, 6-20-83, pp. 8, (Rep: M.E. Olsen)

Nov. 18 TRANSCRIPT OF PROCEEDINGS, 10-31-83, pp. 33 (Rep: G. A. Slodysko)

Nov. 21 MOTION by defts. to dismiss or, in the alternative, for judgment of affirmance; P/A; (Administrative Record 8).

Nov. 29 MOTION by Pltf. for leave to file Pltf.'s motion in opposition to Defts.' motion and Pltf.'s cross-motion for judgment on the merits nunc pro tunc; P & A's: EXHIBIT (Motion in opposition to Deft.'s motion to dismiss, or, alternatively, and Pltf.'s cross-motion for judgment on the merits)

Dec. 6 ORDER filed 12-1-83 extending time one (1) day for Pltf. to file its motion in opposition to Defts.' motion and its cross motion for judgment on the merits. (N) RICHEY, J.

Dec. 6 MOTION filed 12-2-83 by Pltf. in opposition to Deft.'s motion to dismiss or, alternatively, for judgment of affirmance and Pltf.'s cross-motion for judgment on the merits; P & A's.

Dec. 6 REPLY filed 12-5-83 by Defts. to Pltf.'s opposition to Defts.' motion to dismiss or, in the alternative, for judgment of affirmance.

Dec. 6 NOTICE by Pltf. of filing the attached corrected memorandum of points and authorities to the one filed November 29, 1983; Attachment.

Dec. 12 MEMORANDUM Opinion filed 12/6/83. RICHEY, J

Dec. 12 ORDER filed 12/6/83 affirming judgment of Secretary of Navy; dismissing case with prejudice. (N) RICHEY, J.

Dec. 22 NOTICE OF APPEAL by pltf. from order entered 12-12-83; $5.00 USDC fee and $65.00 USCA fee paid and credited to U. S. Treasury; copy of notice sent to: Charles Gross and William Birney.

Dec. 29 COPY of Notice of Appeal and docket entries transmitted to USCA; USCA#83-2343.

DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
WASHINGTON, D.C. 20370

JSR:vmt
7015-83
7 November 1983

From: Chairman, Board for Correction of Naval Records

To: Secretary of the Navy

Subj: VAN DRASEK, John R., Jr., CAPT, USMC, 474 48 50 84; Review of naval record

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 23Jun83 w/copy of amended verified complaint

(2) Copy of record of proceedings under Article 138, UCMJ

(3) Transcript of oral hearing w/exhibits 63-66

(4) Examiner's brief dtd 7Oct83 less tabs

(5) *Issues Presented by Petitioner's Application* w/exhibits 1-62

(6) PERB report, HQMC (MMCP) memo dtd 22Sep83 w/enclosures (1) - (5)

(7) Fitness Report Brief dtd 1Jul83

(8) HQMC (MMOS-2) memo dtd 31Oct83

(9) Officer's microfiche record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, enclosure (1), with this Board requesting, in effect, the following corrective actions:

a. Locate at least six unspecified fitness reports alleged to have been missing from Petitioner's naval record as of 10 June 1983, inform Petitioner of the circumstances surrounding their absence and make them available to him.

b. Remove from petitioner's naval record the fitness reports for the periods 23 June 1981 to 30 November 1981 and 1 October 1981 to 31 May 1982 and insert in their place new fitness reports that reflect the true nature of Petitioner's fitness as a Marine Corps officer. Copies of the contested reports are at Tabs A and B, respectively.

c. Direct Petitioner's reconsideration for promotion to major and if he is selected, award him the back pay to which he would have been entitled, had he been selected by the first board before which he failed of selection.

d. Make certain revisions of the record of proceedings regarding Petitioner's complaint of wrongs under Article 138, Uniform Code of Military Justice (UCMJ) or cause a new investigation of the complaint to be conducted. A copy of the record of proceedings under Article 138 is at enclosure (2). By letter dated 6 October 1983, the Executive Director of the Board advised Petitioner's attorney that "... it is the position of the Board that this request [request d.] is beyond the scope of corrections traditionally made by the Board."

2. The Board, consisting of Messrs. Cross, Herman and Singer, conducted a hearing in this case on 21 October 1983. Petitioner appeared with counsel; he and two other witnesses testified. Enclosure (3) is the verbatim transcript of the hearing. In addition to the evidence and argument

presented at the hearing, the Board considered enclosures (1) and (2) and (4) through (9) to this report; naval records, and applicable statutes, regulations and policies. The Board completed its deliberations on 7 November 1983.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegation of error and injustice, finds as follows:

a. Prior to filing his application with this Board, Petitioner exhausted all administrative remedies afforded him under existing law and regulations within the Department of the Navy.

b. Petitioner was assigned to duty at OCS (Officer Candidates School), MCDEC (Marine Corps Development and Education Command), Quantico, Virginia from 23 June 1981 through 28 September 1982. The officer who served as the Commanding Officer (CO), OCS during that entire period acted as Petitioner's reporting senior on his fitness reports for the periods 23 June 1981 to 30 November 1981 and 1 December 1981 to 31 May 1982, during which Petitioner served as Director, NCO Leadership School (NCOLS). He acted as reviewing officer on Petitioner's fitness reports for the periods 1 June 1982 to 27 August 1982 and 28 August 1982 to 28 September 1982, during which Petitioner was officially designated as an academic officer. Petitioner asserts that the report ending 27 August 1982 is a fair evaluation. The report ending 28 September 1982 is a "not observed" report. Copies of those two uncontested reports are at Tabs C and D, respectively.

c. On 8 September 1981, the CO, OCS submitted Petitioner's fitness report for the period 23 June 1981 to 30 November 1981. He was marked "excellent" in item 15a. ("General Value to the Service"); the distribution in item 15b. showed him last of four officers rated. He was marked "Be Glad" in item 16. ("Considering the Requirements of Service in War, Indicate Your Attitude toward Having this Marine Under Your Command"). This report included no

unfavorable narrative comments. The stamp on this report indicated that it arrived at Headquarters Marine Corps (HQMC) by 12 January 1982.

d. Petitioner was considered as an officer in the zone by the 1982 Major Selection Board. He failed of selection before that board, which convened on 7 April 1982 and concluded on 13 April 1982.

e. On 14 June 1982, the CO, OCS submitted Petitioner's fitness report for the period 1 December 1981 to 31 May 1982. He was marked "excellent" in item 15a; the item 15b. distribution showed him last of three officers rated. He was marked "Particularly Desire" in item 16. This report included no unfavorable narrative comments. The stamp on this report shows that it arrived at HQMC by 28 June 1982.

f. By orders dated 2 July 1982, the Commanding General (CG), MCDEC appointed Petitioner and four other officers to serve on MCDEC administrative discharge board (ADB) 6-82 for the period 1 July-31 December 1982. Petitioner was the only appointee from OCS. Paragraph 3.a. of MCDEC Order 5420.13C dated 3 April 1981 stated, in pertinent part, that "Personnel [for ADB duty] will be nominated for a 6-month period. Therefore, no nominee shall be in receipt of or be expecting receipt of PCS [permanent change of station] orders . . . during the period for which nominated."

g. On 16 July 1982, ADB 6-82 unanimously recommended that the respondent, who was undergoing administrative discharge processing for drug abuse, be retained in the Marine Corps. On 6 August 1982, the CO, OCS, without authority from the CG, MCDEC, had Petitioner removed from a case to be reviewed by ADB 6-82. On 10 August 1982, ADB 6-82, including Petitioner, unanimously recommended that a different respondent be discharged for drug abuse and misconduct, but that he receive an honorable discharge.

h. By orders dated 10 August 1982, Petitioner's transfer from OCS effective 13 August 1982 was directed.

i. By orders dated 12 August 1982, an officer was named to replace Petitioner on the MCDEC ADB.

j. On 13 August 1982, Petitioner had a transfer debrief with the CO, OCS.

k. On 15 August 1982, Petitioner broke his leg in a parachuting accident.

l. By orders dated 17 August 1982, the orders of 10 August 1982 for Petitioner's transfer from OCS effective 13 August 1982 were cancelled.

m. Petitioner's fitness report for the period 1 June 1982 to 27 August 1982 was submitted on 27 August 19082 and reviewed without comment by the CO, OCS on 1 September 1982. In this report, Petitioner was marked between "excellent" and "outstanding" in item 15a. In item 15b., six officers were rated with him, five above him and none below him. He was marked "Particularly Desire" in item 16.

n. Effective 28 September 1982, Petitioner was transferred from OCS. His transfer fitness report for the period 28 August 1982 to 28 September 1982 was a "not observed" report. It was submitted on 7 October 1982 and reviewed without comment by the CO, OCS on 8 October 1982.

o. By letters dated 29 September and 8 October 1982, Petitioner initiated a complaint of wrongs under Article 138, UCMJ against the CO, OCS. He alleged that the CO, OCS exerted improper influence on OCS personnel with regard to their testifying on behalf of Marines who were the subject of judicial or administrative discharge actions and with regard to their voting practices as members of courts-martial and ADB's. He also complained that his removal from the MCDEC ADB and his transfer from OCS had been in reprisal for his part in the ADB decision of 16 July 1982 to retain the respondent.

p. By third endorsement of 26 November 1982 on Petitioner's complaint of 8 October 1982, the CO, OCS responded to that complaint. He asserted, in part, that as early as spring 1982, he had contemplated effecting Petitioner's transfer in summer 1982 because of his dissatisfaction with Petitioner. He stated that Petitioner had had difficulty getting along with the staff and that he would not accept responsibility for problems. He further stated that as a result of his meeting with Petitioner on 13 August 1982, he decided to keep him at OCS, but then decided to transfer him as a result of his subsequent parachute injury. Attached to this endorsement were four statements obtained by the CO, OCS. Petitioner contends that it was improper for the CO, OCS to have obtained those statements. He asserts it is unlikely that the CO, OCS was contemplating his transfer as early as he states, because the officer with whom he allegedly discussed such transfer did not recall such a discussion, and because Petitioner probably would not have been assigned to a six-month term with the ADB on 2 July 1982 if his transfer that summer had already been contemplated. In the latter connection, Petitioner cites MCDEC Order 5420.13C, quoted at paragraph 3.f. above. He complains that although he was assigned an attorney to assist him in responding to the CO, OCS, he was not permitted to enter an attorney-client relationship with him.

q. By fourth endorsement of 14 January 1983 on Petitioner's complaint of 8 October 1982, Petitioner responded to the CO, OCS third endorsement. Petitioner's fourth endorsement included enclosures (7) through (35).

r. On 20 January 1983, the CG, MCDEC appointed an officer to investigate Petitioner's complaint under Article 138. That officer's final report, dated 28 February 1983, concluded that the CO, OCS did not commit the wrongs alleged by Petitioner. However, he did find that a number of officers at OCS perceived that they were subject to pressure with regard to testifying and voting in courts-martial and administrative discharge actions. Petitioner complains that

the investigating officer reported conclusions inconsistent with the evidence and failed to obtain statements from witnesses who would have supported Petitioner.

s. On 8 March 1983, the 1983 Major Selection Board convened. Petitioner was considered, but not selected. That board adjourned on 7 April 1983. By consequence of Petitioner's having sustained two failures of selection for promotion to major, he is subject to mandatory discharge on 1 November 1983 or as soon thereafter as he completes physical disability processing.

t. The action of the CG, MCDEC on Petitioner's complaint under Article 138 issued on 4 April 1983. He directed that steps be taken to ensure that proper practices are followed by MCDEC with regard to appointing and relieving members of ADB's, that the CO, OCS make it clear to his subordinates that they are subject to no improper influence with regard to judicial and administrative proceedings, and that the CO, OCS be advised of evidence in the report of investigation that female Marines at OCS perceived that they were receiving inappropriate treatment. This action was reviewed by the Office of the Judge Advocate General on 25 April 1983 and approved by the Secretary of the Navy on 17 May 1983.

u. Petitioner filed a complaint in the United States District Court for the District of Columbia. That judicial action was dismissed without prejudice on 31 August 1983 pending Petitioner's exhaustion of his remedies before the Board. A copy of the complaint is at enclosure (1). On 31 October 1983, the court issued a temporary restraining order against Petitioner's discharge from the Marine Corps.

v. Petitioner's initial application to the Board, dated 23 June 1983, requested the same relief sought in his complaint, to the extent that such relief was ". . . within the Board's power to grant."

w. By letter dated 9 July 1983, Petitioner's counsel supplemented the original application with a list of *Issues Presented by Petitioner's Application.* That document, with its 62 exhibits, is at enclosure (5).

x. In enclosures (1) and (5), Petitioner alleges, in essence, that he was dismissed from duty with the ADB, transferred from OCS and failed of selection by the 1983 Major Selection Board in reprisal for his votes on the ADB of 16 July 1982 and 10 August 1982 and for his verbal and written complaints against his superiors. He alleges that the contested fitness reports signed by the CO, OCS are inaccurate appraisals of his performance. He contends that these fitness reports, in conjunction with an incomplete record of his performance, contributed to his failures of selection for promotion. He contends that there is substantial evidence indicating that the CO, OCS is insensitive to the protection of individual rights, that he is willing to break the law and violate individual rights to achieve a desired result, and that he has poor judgment. The evidence he cites in that connection includes the fact that on 11 February 1982, the CO, OCS signed OCS order P1530.20 (copy at enclosure (5), exhibit 58), which specifically dictates that males be selected for certain billets at OCS; the fact that on 26 January 1982, the CO, OCS signed OCS order 5355.2 (copy at enclosure (5), exhibit 57), paragraph 6.a. of which provides that "Positive [urinalysis] test results are considered 100% accurate;" the fact that on 6 August 1982, he illegally had Petitioner removed from the ADB without authority of the CG, MCDEC, who had originally appointed him; and the evidence, adduced in the investigation of Petitioner's Article 138 complaint, that the CO, OCS had made statements leading his subordinates to believe that he would disapprove if they either testified or voted as court or board members in favor of individuals against whom the command was attempting to take judicial or administrative discharge action.

y. On 21 September 1983, the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) considered Petitioner's case and voted to deny relief. The report of the PERB, dated 22 September 1983, reflects that Petitioner's request for removal of the fitness reports ending 30 November 1981 and 31 May 1982 was denied in substantial reliance on an opinion from the Judge Advocate Division (Code JA), HQMC. The PERB also considered inputs from the following offices within HQMC: Fitness Report Section (Code MMOS-2), Promotions Branch (Code MMPR) and Career Planning Branch (Code MMCP). The PERB report, the inputs from Codes MMOS-2, MMPR and MMCP, and the opinion from Code JA are at enclosure (6).

z. Code MMOS-2 advised that there are gaps in Petitioner's fitness report record for 13 July to 1 August 1973, 9 October 1975 and 1 June to July 1980. However, that office attributed those gaps to administrative error in the reporting dates.

aa. Code MMCP expressed the opinion that removal of the four OCS fitness reports would have had "little impact" on Petitioner's competitiveness for promotion.

bb. Code JA concluded that the Board should not act as a reviewing authority for appeals of unsuccessful complaints under Article 138, UCMJ, so that the only portion of Petitioner's application properly before the Board was that which pertained to the contested fitness reports and the failures of selection for promotion. Code JA concluded, in essence, that the evidence does not support Petitioner's contentions. Code JA noted that the contested fitness reports, as well as Petitioner's first failure of selection for promotion, preceded his vote on the ADB on 16 July 1982. Code JA also noted that the contested fitness reports are not substantially different from either the unchallenged fitness report (for the period 1 June to 27 August 1982) which immediately follows those reports or from the other uncontested reports in Petitioner's record

(Petitioner's Fitness Report Brief as of 1 July 1983 is at enclosure (7); his microfiche record as of August 1983 is at enclosure (9)). Code JA stated that "There is absolutely no evidence of record that the second [1983] selection board members had knowledge of any of the events upon which [Petitioner] premises this retaliation theory [that he was the subject of retaliation for his complaints to the CO, OCS and others as well as his filing of the Article 138 complaint]." In regard to the MMCP opinion discussed at paragraph 3.aa. above, Code JA stated that ". . . the Board should not usurp the functions of a selection board . . ." and that "If it is determined that the presence of one or more of these [contested fitness] reports may have contributed to [Petitioner's] nonselection, and that such report was erroneous or unjust, [Petitioner] should be afforded appropriate relief."

cc. At the oral hearing, Petitioner's counsel argued that the Board could properly entertain Petitioner's request for correction of the record of proceedings under Article 138, UCMJ even though that record does not appear in Petitioner's own military personnel or medical record, because it is a naval record, and the words of reference (a) are clear without resort to legislative intent.

dd. Testimony was offered at the hearing by Petitioner and two other witnesses: a former Marine Corps officer who had served with Petitioner at OCS while Petitioner was the Director, NCOLS and a female Marine captain who also had served with Petitioner at OCS. Petitioner testified that in October 1981, he decided that pregnant Marines should be allowed to attend NCOLS and that the CO, OCS reluctantly agreed to this departure from previouslty established policy at OCS. The former officer testified that the CO, OCS and Petitioner clashed not only on the issue of admitting pregnant Marines to OCS, but also on other issues as well. He stated that the CO, OCS did not like subordinates to take issue with him as Petitioner did. He expressed the opinion that Petitioner deserved much better

fitness reports than those he received form the CO, OCS for his service at the NCOLS. The female officer testified that under the CO of concern in this case, the environment at OCS left much to be desired in terms of sensitivity to women's issues. She stated that she regarded Petitioner as a model of what a Marine Corps officer should be. Petitioner testified that immediately after he had informed the CO, OCS that the ADB had recommended retention in the case heard on 16 July 1982, Petitioner overheard, from the passageway outside the CO's office, an angry reaction from that officer. Petitioner stated that at his transfer debrief on 13 August 1982, he complained to the CO, OCS that he believed his transfer orders had been issued in response to his having voted as he did on the ADB. He testified that after his orders for transfer effective 28 September 1982 issued, he had to ask the CO, OCS for a debrief, whereas such a meeting was ordinarily a matter of course. Finally, he testified that at that meeting, the CO, OCS acknowledged that he felt Petitioner had displayed poor judgment by his vote on the ADB case heard on 16 July 1982.

ee. At the hearing, Petitioner's counsel argued that the 1983 Selection Board most probably knew about Petitioner's complaint against his superiors and held it against him. He asserted that the promotion board could not have had a valid basis for not selecting Petitioner, because his record was so competitive on its face. He alleged that Petitioner's record before the 1982 Selection Board was incomplete, because his exhibit 65 (at enclosure (3)) shows that the fitness reports for the periods 1 June 1978 to 31 October 1978 and 1 November 1978 to 31 May 1979 were "procesed" by HQMC on 23 April 1982, after that promotion board had adjourned. He further alleged that Petitioner's record before the 1983 Selection Board was incomplete, because it lacked his latest fitness reports, for the periods 1 December 1982 to 24 February 1983 and 25 February 1983 to 31 May 1983 (exhibits 63 and 64 at enclosure (3)). Finally, he alleged that Petitioner's record was incomplete before both promotion boards, because his

exhibit 66 (at enclosure (3)) shows that the fitness reports for the periods 1 October 1974 to 22 November 1974 and 10 October 1975 to 31 January 1976 were "processed" by HQMC on 5 August 1983, after both boards had adjourned; because a fitness report for the period 23 November 1974 to 27 January 1975 does not appear on his brief sheet (enclosure (7)), although it appears in his official record; because his "not observed" fitness report for the period 11 July 1979 to 28 March 1980, although it appears in his official record and on his brief sheet, includes narrative comments that are not reflected on the brief sheet; and because his fitness report for the period 2 July 1980 to 30 November 1980 is not in his official record, although it appears on his brief sheet.

ff. Enclosure (8) is an advisory opinion from the Fitness Report Section, HQMC addressing Petitioner's contentions regarding incompleteness of his record before the 1982 and 1983 Major Selection Boards. It states that the processing dates reflected on Petitioner's exhibits 65 and 66 have no correlation with the dates on which the fitness reports involved were received; that the fitness report ending 24 February 1983 was provided to the 1983 Selection Board and that the report ending 31 May 1983 could not possibly have been before that board; that the report for the period 23 November 1974 to 27 January 1975 and the narrative comments in the report for the period 11 July 1979 to 28 March 1980 were in Petitioner's official record before both boards; and that although the report for the period 2 July to 30 November 1980 cannot be located, the marks from that report were available to both boards.

gg. Petitioner's record before both the 1982 and 1983 promotion boards reflected a number of uncontested fitness reports in which other officers were rated clearly above Petitioner; it included two uncontested transfer fitness reports, for the periods 1 December 1980 to 6 April 1981 and 13 May 1981 to 22 June 1981, which were clearly less

favorable than the immediately preceding reports at the same station (2 July 1980 to 30 November 1980 and 1 April 1981 to 12 May 1981, respectively), thereby indicating a declining trend of performance; and it reflected the following comments in the uncontested report for the period 1 December 1980 to 6 April 1981:

> Despite his knowledge of ground reconnaissance, the necessary professional and personal relations between himself and certain key members in the Battalion never developed as they should have. As a result, his potential was never fully realized as the Operations Officer. He is aware and concerned over the situation and the resultant gulf that existed. In spite of efforts on both sides of the problem, the gulf was not bridged and in the best interests of all concerned, I have transferred [Petitioner].

CONCLUSION:

After due consideration of the arguments of Petitioner's counsel, the Board finds that his request for correction of the record of proceedings under Article 138, UCMJ is not a matter properly before the Board. In that regard, the Board particularly notes that this record of proceedings does not appear in Petitioner's military personnel record (enclosure (9)). The Board adopts the position stated by the attorney-advisor assigned to this case (see transcript of oral hearing, enclosure (3), pp. 6 and 7).

The Board finds that Petitioner's official record is lacking his fitness report for the period 2 July 1980 to 30 November 1980. The Board feels that efforts should be made to locate that report, which apparently must have been submitted, inasmuch as it is reflected on Petitioner's fitness report brief (enclosure (7)).

The Board is unable to find that the contested fitness reports for the periods 23 June 1981 to 30 November 1981

and 1 October 1981 to 31 May 1982 are either erroneous or unjust. The Board notes that evidence, summarized at paragraph 3.dd. above, was adduced at the hearing to the effect that Petitioner had policy conflicts with the CO, OCS as early as October 1981 and that Petitioner should have received better fitness reports than he did for his performance at the NCOLS. The Board also notes that there is substantial additional evidence of record raising questions about the judgment and fairness of the CO, OCS. In that connection, the Board finds the evidence sufficient to establish that the CO, OCS may well have allowed Petitioner's voting on the ADB to influence his decision to seek Petitioner's transfer from OCS. Nevertheless, the Board is not convinced that the CO, OCS was generally deficient in judgment and fairness, such that he should be considered incapable of submitting fair and accurate appraisals of his subordinates' performance. In concluding that the contested fitness reports should not be removed, the Board particularly notes that they are "excellent" reports and that they include no unfavorable narrative remarks. The Board finds that these fitness reports are not aberrant when compared with the other reports in Petitioner's record. Finally, the Board notes that neither of these reports could have been influenced by Petitioner's voting on the ADB, because he was not appointed to serve on the ADB until after reports had been submitted.

The Board is unable to find that either of Petitioner's failures of selection for promotion was erroneous or unjust. As stated above, the Board finds no basis for removal of either of the two contested fitness reports signed by the CO, OCS, and thus the Board finds nothing objectionable in the fact that one or both of those reports was in Petitioner's record before the 1982 and 1983 promotion boards. The Board finds that Petitioner's record before both boards was substantially complete, despite the absence of the five-month report for the period 2 July to 30 November 1980. The Board is not persuaded by the evidence of record that the 1983 Selection Board was even aware of Petitioner's complaint against his superiors, much less that the board

improperly held against him the fact that he exercised his rights under Article 138, UCMJ. The Board does not accept Petitioner's contention that his record before the 1983 Selection Board was so good that his failure to be selected must have been based on improper considerations. In that regard, the Board takes special note of the matters cited at paragraph 3.gg. above.

The Board does not deem it necessary to submit, pursuant to its authority under Section 6.(a)(4) of its regulations (32 C.F.R. 723.6(a)(4)), separate correspondence to the Secretary of the Navy as to matters arising from but not directly related to the issues of this case.

In view of the foregoing, the Board recommends the following limited corrective action:

RECOMMENDATION:

a. That the Commandant of the Marine Corps be directed to take all reasonable steps to locate and file in Petitioner's naval record his fitness report for the period 2 July 1980 to 30 November 1980.

b. That this record of proceedings be returned to this Board for retention in a confidential file maintained for such purpose, with no reference thereto being made a part of Petitioner's naval record.

c. That the remainder of Petitioner's request be denied.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above-entitled matter.

ROBERT D. ZSALMAN
Recorder

/s/ JONATHAN S. RUSKIN
Acting Recorder

5. The foregoing recommendation of the Board is submitted for your review and action.

Reviewed and approved: 9 Nov 1983
/s/ CHAPMAN B. COX
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)

/s/ W. DEAN PFEIFFER

(5)

No. 86-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CPT JOHN R. VAN DRASEK, U.S.M.C. (RET.),
Petitioner,

v.

JOHN F. LEHMAN, JR.,
SECRETARY OF THE NAVY,
CHAPMAN COX,
ASSISTANT SECRETARY OF THE NAVY
FOR MANPOWER AND RESERVE AFFAIRS,
AND
THE UNITED STATES OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

STEPHEN G. MILLIKEN, ESQUIRE
Milliken, Van Susteren & Canan, P.C.
511 E Street, N.W.
Washington, D.C. 20001
(202) 393-7676

STUART A. STEINBERG, ESQUIRE
Veterans Outreach Services, Inc.
Vietnam Veterans Outreach Center
P.O. Box 747
Greenfield, MA 01302
(413) 773-3651

Attorney for Petitioner

ALPHA GRAPHICS, INC., • WASHINGTON, D.C. • (202) 331-8101

65 PP

QUESTION PRESENTED

1. Whether military personnel should be denied judicial review when seeking only equitable relief for Constitutional, statutory, or regulatory violations committed by their superior officers.

LIST OF PARTIES

The petitioner is Captain John R. Van Drasek, U.S.M.C. (Ret.). The respondents are The Honorable John F. Lehman, Jr., Secretary of the Navy, Chapman Cox, Assistant Secretary of the Navy for Manpower and Reserve Affairs, and The United States of America.

TABLE OF CONTENTS

Table of Contents-Cont. **Page**

Table of Contents-Cont. **Page**

TABLE OF AUTHORITIES

Cases—Cont. **Page**

Cases-Cont. **Page**

Cases-Cont. **Page**

Cases-Cont. **Page**

STATUTES

REGULATIONS **Page**

CONSTITUTIONAL PROVISIONS

Regulations-Cont. **Page**

OTHER AUTHORITIES

No. 86-319

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

CPT JOHN R. VAN DRASEK, U.S.M.C. (RET.),
Petitioner,

v.

JOHN F. LEHMAN, JR.,
SECRETARY OF THE NAVY,
CHAPMAN COX,
ASSISTANT SECRETARY OF THE NAVY
FOR MANPOWER AND RESERVE AFFAIRS,
AND
THE UNITED STATES OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The United States Court of Appeals for the Federal Circuit affirmed the judgment of the United States District Court for the District of Columbia without written opinion but by adoption of the trial court opinion. *See Van Drasek v. Lehman, et al., Petition for a Writ of Certiorari, Appendix at A-1, No. 86-319 (U.S. Sup. Ct.) [hereinafter, "Cert. Pet. App. at ____"].* The opinion of the Federal Circuit was rendered on January 23, 1986, and a *Petition for Rehearing with Suggestion for Rehearing En Banc* was denied on April 1, 1986.

The opinion of the trial court of December 6, 1983, is unreported and was reproduced and attached to the *Petition for a Writ of Certiorari* in the instant case. *See Cert. Pet. App. at A-2 to A-8.* Appeal was first taken to the United States Court of Appeals for the District of Columbia Circuit. That court transferred the appeal to the United States Court of Appeals for the Federal Circuit, pursuant to 28 U.S.C. Section 1631 (1982), under the authority of the Federal Courts Improvement Act, 28 U.S.C. Section 1295(a)(2) (1982). *Van Drasek v. Lehman, et al.*, 762 F.2d 1065, 1067 1072 (D.C. Cir. 1985). That opinion was also reproduced and attached to the *Petition for a Writ of Certiorari* in the instant case. *See Cert. Pet. App. at A-9 to A-18.*

JURISDICTION

The United States Court of Appeals for the Federal Circuit entered the judgment in this case on January 23, 1986. Petitioner's motion for rehearing was denied on April 1, 1986. The jurisdiction of this Court is invoked pursuant to 18 U.S.C. Section 1254(1) and Rule 17 of the United States Supreme Court Rules.

• • • • •

CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution, Amendment 1, provides, in part, that:

> Congress shall make no law . . . abridging the freedom of speech . . .; or of the right of people to . . . . petition the government for redress of grievances.

2. United States Constitution, Amendment 5, provides in pertinent part:

> No person shall . . . be deprived of life, liberty, and property without due process of law. . . .

• • • • •

STATEMENT

Petitioner John Van Drasek enlisted in the United States Marine Corps in 1965 and served from 1966-68 in combat leadership positions in Vietnam, receiving the Bronze Star Medal, with "V" Device for Distinguished Combat Service. *A R, Vol. IV, pp. 199-200.*[1] After being seriously wounded and a lengthy recovery, the Petitioner completed a college degree and was commissioned as a Second Lieutenant, always being promoted to the next highest rank in the shortest time possible, until his promotion to Captain. (JA 84).[2]

On June 17, 1983, Petitioner, having been twice passed over for promotion to Major, instituted an action in the United States District Court for the District of Columbia challenging his involuntary separation from the Marines pursuant to 10 U.S.C. Section 632 (1982). *Cert. Pet. App. at A-2.* Petitioner's suit alleged that his First and Fifth Amendment rights were violated because of complaints he made, pursant to Article 138, Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. Section 938 (1982), against his superior commanding officer. The Article 138 Complaint had alleged that Petitioner's superior commanding officer, COL M.T. Cooper, had denied equal employment opportunity to women Marines, and had exerted command influence in courts-martial and administrative discharge boards ("ADB"). *Cert. Pet. App. at A-2.* Petitioner's Federal lawsuit also alleged that his failure to be promoted, and subsequent forced separation from the Marines, was improper and retaliatory, resulting from his filing the Article 138 Complaint. *Id.* at A-2.

From June 28, 1981 to September 28, 1982, Petitioner, then a Captain, served at the Officer Candidate School ("OCS"), Marine Corps Development and Education Command ("MCDEC"), in Quantico, Virginia, as Director of the Non-

---

[1] "AR" refers to the Administrative Record (in four volumes) before the Board for Correction of Naval Records ("BCNR").

[2] "JA" refers to the Joint Appendix filed in the United States Court of Appeals for the Federal Circuit.

commissioned Officers Leadership School ("NCOLS"). In October, 1981, Petitioner challenged his commanding officer, COL Cooper, in regard to the exclusion of pregnant Marines from courses at NCOLS. *A R, Vol. IV, pp. 241-250.*[3] A few weeks later, COL Cooper filed a fitness report on the Petitioner for the period June 23, 1981 to November 30, 1981. *Cert. Pet. App. at A-3.* The fitness report rated the Petitioner "excellent," the second highest rating, in every observed category. *Id.* at A-3. Thus, for the first time since 1974, Petitioner was rated without a single "outstanding," the highest possible rating. (JA 84). Such a bright line report is commonly known among Marine Corps officers as a "killer" fitness report. *A R, Vol. IV, p. 331.* It was this fitness report which was the last entry in Petitioner's Service Record Book ("SRB") and Fitness Report Brief that was before the April, 1982, Major Selection Board, which passed him over for promotion to Major the first time. This was Petitioner's first promotion passover in his military career. *A R, Vol. IV, pp. 305-307;* (JA 6).

On May 18, 1982, through proposed MCDEC Order 1510.10 for the NCOLS 1982-83 academic year, Petitioner formally recommended against discriminatory treatment of pregnant Marines. *App. 20-21.*[4] Shortly thereafter, COL Cooper issued a second fitness report on the Petitioner which covered the period December 1, 1981 to May 31, 1982. *Cert. Pet. App. at A-3.* This report contained mostly marks of "excellent" and several of "outstanding." However, it was this report which appeared before the second Major Selection Board, in March, 1983, which failed to select Petitioner for Major, ensuring his mandatory separation form the Marines pursuant to 10 U.S.C. Section 632 (1982).

---

[3] In February, 1982, COL Cooper ordered the OCS's *Standard Operating Procedures,* requiring use of "male candidate[s]" for parade honor billets for all but one staff position. (App. 20-21) ("App." refers to the Appendix of Pertinent Statutes and Regulations in Petitioner's Brief in the Federal Circuit.) Cooper's order was in direct contravention of the *Marine Corps Equal Opportunity Manual, MCO P5354.1.*

[4] In response, MCDEC Order 1510.10D, App. 29-30, barring pregnant Marines from NCOLS, in violation of MCO P5354.1, *supra,* para. 3009, was issued on October 20, 1982. *See* MCDEC Order 1510.10D, para. 4a(4).

On July 16, 1982, the Petitioner, while serving a six-month term on an ADB, joined a unanimous vote in the *Frederick* case to retain a Marine despite an alleged drug abuse problem. *Cert. Pet. App. at A-3.* Thereafter, on August 6, 1982, COL Cooper, without authority, removed Petitioner from a case being reviewed by the ADB.[5] *Cert. Pet. App. at A-3.* On August 10, 1982, Petitioner voted for an Honorable Discharge in the *North* case, which was reviewed by the same ADB for drug and misconduct charges. *Cert. Pet. App. at A-3.* On the same day, following a lengthy discussion with COL Cooper about the *North* case, Petitioner was ordered transferred from OCS, which was Cooper's command.[6] Although he cancelled these orders within a few days, Cooper finally succeeded in having Petitioner transferred from OCS on September 28, 1982, on the ground that he was medically unfit, *Cert. Pet. App. at A-3,*[7] following

---

[5] In his April 4, 1983, Memorandum to the Respondents, General D.M. Twomey, Petitioner's commanding general who was responsible for review of the Petitioner's Article 138 Complaint, noted that Petitioner "did not participate in an [ADB] proceeding from which he had not been properly excused by [COL Cooper] . . . and . . . the officer nominated to replace him on the [ADB] had participated in the board's consideration of the case without being assigned by an authorized officer. . . . [T]he proceeding was set aside and referred to another [ADB]." (JA 75).

[6] On July 2, 1982, General Twomey assigned Petitioner to ADB duty for a period of six months, beginning on July 1, 1982, and ending on December 31. *See* Art. 138 Pkg., p. 87. The July 2 order specifically states that only "the convening authority"—Twomey—could relieve or excuse an officer assigned to ADB duty. *Id.* Thus, Cooper's actions in removing Petitioner from an ADB—and, perhaps, even his transfer—were in clear violation of Twomey's written orders of July 2, 1982.

[7] It has been unrebutted that Cooper's subordinates who gave statements during the Article 138 Complaint investigation which supported Cooper and cast aspersions on the Petitioner's character, had equally or more serious medical problems and were allowed to remain at OCS by Cooper.

Petitioner's accident while parachuting, an activity authorized by Cooper. *AR, Vol. III, p. 57.*[8] The OCS assignment under Cooper was critical for Petitioner's promotion to Major. *AR, Vol. IV, pp. 252-253.*

During the investigation of the Article 138 Complaint, COL Cooper stated that he had considered transferring Petitioner due to dissatisfaction with his performance in the Spring of 1982. *Cert. Pet. App. at A-4.* This was the same period of time that Petitioner and Cooper had their conflict over the treatment of women Marines at NCOLS, *id.* at A-4, and Petitioner's Fitness Report ratings of "excellent" by Cooper. *AR, Vol. IV, pp. 37-42.* Thus, it is inconsistent for Cooper to have contemplated transferring Petitioner for unsatisfactory performance, unless an "excellent" rating is indeed a "killer" Fitness Report. The contention that an "excellent" Fitness Report is a "killer" report has been raised by Petitioner at all levels of the case below, *see AR, Vol. IV, p. 331,* and has never been rebutted by the Respondents. Moreover, it cannot be missed that Petitioner proposed that Cooper not exclude pregnant Marines from NCOLS on May 18, 1982; that shortly thereafter Cooper wrote the second Fitness Report which resulted in Petitioner's mandatory separation; that Petitioner was transferred from Cooper's command on September 28, 1982; and that Cooper issued an order on October 20, 1982, which did, in fact, exclude pregnant Marines from NCOLS in violation of Department of Defense and the Respondents' own policies regarding equal employment opportunity for women in the military.

[8] Petitioner was subsequently retired as 70% disabled, largely as a result of combat and parachuting injuries, after the Federal Circuit rendered its decision in this case. It is worth noting that the Respondents never moved to separate Petitioner for any alleged disability *until after* Judges Parker and Richey more or less forced the Respondents to agree to stay the Petitioner's involuntary separation caused by the two promotion passovers.

Pursuant to Article 138 of the UCMJ, 10 U.S.C. Section 938 (1982), Naval Regulations (NAVREGS),[9] and the Manual of the Judge Advocate General of the Navy (JAGMAN),[10] Petitioner initiated a complaint against COL Cooper by formal letters dated September 29 and October 8, 1982. *Cert. Pet. App. at A-3.* He alleged that Cooper had exerted improper command influence on OCS personnel with regard to their testifying on behalf of Marines who were the subjects of judicial and administrative discharge actions and with regard to their voting as members of courts-martial and ADBs. He also alleged that his removal from the ADB by Cooper, and his transfer from Cooper's command at OCS, had been in retaliation for his part in the ADB decisions in the *North* and *Frederick* cases. *Id.* at A-3.

The Petitioner's Article 138 Complaint was investigated by Colonel Curtis G. Lawson, who was appointed by General Twomey, and who issued a report dated February 28, 1983. *Cert. Pet. App. at A-4;* (JA 51-72). Although he concluded that COL Cooper did not commit the wrongs alleged, in contradiction to that conclusion COL Lawson found that a number of Cooper's subordinates at OCS felt that they were subject to pressure with regard to testifying and voting in courts-martial and ADB proceedings. *Cert. Pet. App. at A-4.* In addition, COL Lawson also accepted Cooper's explanation regarding Petitioner's transfer from Cooper's command. In a number of regards, Lawson's investigative findings did not square with his conclusions, particularly that the Petitioner did not sustain his Article 138 Complaint against COL Cooper. For instance, while concluding that Cooper had not been involved in the exertion of command influence in courts-martial and ADBs, Lawson's investigation found, in part, that:

---

[9] Lodged with the Court as suplements to the record are Chapter XI, Manual of the Judge Advocate General of the Navy, and United States Navy Regulations (1973), sections 1101-1106, 1109, 1139, 1201, which implement Article 138, UCMJ, as enacted by Congress and codified at 10 U.S.C. Section 938 (1982). As noted above, these regulations are hereinafter referred to as "NAVREGS" and "JAGMAN."

[10] *See* footnote 9.

(1) the *command* was highly sensitive to adverse rulings on *command* initiated courts and boards. (emphasis added)[11]

(2) this command sensitivity led to questioning of OCS appointed members of courts and boards to determine the rationale for the adverse rulings.

(3) in this highly sensitized situation, *perceptions*[12] as to motives for the command concern were misconstrued by certain members of the command. (emphasis added)

(4) there probably was an imprecise relay (more stringent interpretation) of Colonel Cooper's guidance concerning "favorable testimony" in the instances of Lieutenant Colonel Houle to Company C and Major Labar to the S-3 section.[13] However, even these interpretations were not sufficient to meet an Article 138 complaint of wrongs against Colonel Cooper.

(5) at no time did Colonel Cooper threaten adverse career implications if votes and/or testimony were not in keeping with command desires.

(6) [Petitioner] . . ., Captain Saul, Captain Becker, and others believe that *the incessant command interest on votes and testimony* has become a detriment to honest testimony and voting in the command and a

---

[11] Use of the word "command" by COL Lawson in the Article 138 investigation refers to COL Cooper's command of the Officer Candidate School.

[12] In regard to "perceptions" by COL Cooper's immediate subordinates of command influence, the United States Court of Military Appeals has held that, "the apparent existence of 'command control' . . . is as much to be condemned as its actual existence." *United States v. Johnson*, 14 U.S.C.M.A. 548, 551 (CMA 1964).

[13] It should be noted that Houle and Labar were Cooper's immediate subordinates. They gave written statements to COL Lawson during the Article 138 investigation that attempted to shift responsibility away from Cooper while, at the same time, casting personal aspersions against the character of the Petitioner.

threat to [their] careers. (emphasis added).[14]

(7) the command is incorrect in approaching OCS members of courts/boards for information relative to adverse rulings on OCS initiated actions.

(JA 71-72)

COL Lawson's conclusions are even more puzzling upon examination of his recommendations regarding command influence and Petitioner's Article 138 Complaint. Lawson's final recommendation implicitly recognized the existence of the problem in Cooper's command, while at the same time denied that such was sufficient to sustain Petitioner's Article 138 Complaint: "[I]n the sense of Article 138, . . . there is no basis for [Petitioner's] . . . complaint of wrongs, as he has suffered no personal detriment as a result of command interest in courts and boards action on OCS initiated cases." (JA 72).[15] Two other recommendations by Lawson make the issue even more constrained in logic:

(1) That OCS should address any Command interest on court/board actions and results to the Staff Judge Advocate rather than OCS members of the courts/boards.

(2) That OCS, as well as other Commands of MCDEC, be provided professional legal instruction for all OICs and Commanding Officers relative to

---

[14] *See* footnote 12, *ante*.

[15] This recommendation defies the clear statement in Respondents' own regulations. NAVREGS 1106.1 states that "[i]f any person in the naval service considers himself oppressed by his superior, *or observes in him any misconduct, he . . . shall report such oppression or misconduct to the proper authority.*" (emphasis added). Moreover, NAVREGS 1106.1 would seem to implement the straightforward intent of Congress in 10 U.S.C. Section 5947 (1982): "All commanding officers and others in authority in the naval service are required to . . . guard against and suppress all dissolute and immoral practics, . . . and to take all necessary and proper measures, under the laws, regulations, and customs of the naval service, to promote and safeguard the morale, the physical well-being and the general welfare of the officers and enlisted persons under their command or charge."

> proper and improper testimony and the limits of guidance concerning knowledge of facts versus personal belief and opinion.

(JA 72).

General Twomey's response to the complaint and investigation was to direct that proper practices be followed in staffing ADBs, that Cooper make clear to his subordinates the absence of improper influence on administrative and judicial actions, and that Cooper be advised of the inappropriate treatment of women Marines at the NCOLS. *Cert. Pet. App. at A-4;* (JA 73-77). The Respondents approved this disposition on May 17, 1983. *Cert. Pet. App. at A-4* (JA 81-82). Despite explicit findings that command influence existed in Cooper's command and that women Marines at NCOLS were not treated in accord with Navy and Marine Corps policy, neither Twomey nor the respondents overruled Lawson's conclusions that Petitioner had failed to sustain the allegations of his Article 138 Complaint.

In his initial Article 138 Complaint, Petitioner stated that:

> During a commanding officer's staff meeting in February 1982, the [command influence] issue was first addressed by Colonel Cooper. It seems that during that period certain judicial actions instigated by [Cooper] . . . were being adjudicated by the MCDEC Staff Judge Advocate's Office. When the results of these actions reached [Cooper] . . ., [he] seemed very displeased with them and especially with the fact that members of his command, in some cases, had given credible character testimony on behalf of the defendants. Colonel Cooper's displeasure was further amplified by his message to his commanders and staff, of which I was a member at that time: Colonel Cooper indicated that he believed that military [lawyers] . . . manipulated the facts of cases to suit their own intentions and that for anyone to give credible character testimony in these cases served only to undermine the system of justice and to help the accused, "who were obviously guilty of something or they wouldn't be there in the first place," win the case. . . . During the weeks that followed, I was informed that certain members of the command had been counseled

> by the Commanding Officer, Headquarters and Service Company (Major R.M. Patten), and Colonel Cooper as to their naivete, poor judgment, and lack of command loyalty regarding their testimony and/or voting actions on disciplinary or administrative board proceedings. I was professionally appalled to think that command pressure of that magnitude would be brought to bear in matters of this type.
>
> . . . Upon my return from annual leave I was informed that during my absence at an S-3 Section meeting on 20 July 1982, the word was passed that those who participate in any way in an OCS-initiated administrative board or court-martial action had better be guarded about what they say or how they vote becuase it could affect their careers in the Corps.
>
> . . . [O]n 9 August 1982, I was called in by the Executive Officer, [of OCS] . . . [Major J.P. Rigoulot], for approximately thirty minutes of intense questioning which resulted in an indictment of my professional judgment including implications as to the "obvious" lack of good judgment and loyalty on my part evidenced in the record of my vote to "retain" Sergeant Frederick who was the subject of my last administrative discharge action. Two days later I was relieved in writing from all further responsibilities as the command's representative on [ADBs]. . . . The following day I received orders transferring me out of the command.
>
> On . . . the 13th of August [1982], as I was departing the command, I met with Colonel Cooper and addressed the issue of the reason for my transfer at this time. Colonel Cooper admitted his displeasure with me concerning my vote on the [ADB]. . . . Unbeknownst to me at that time, but later confirmed, was the fact that another member of the command was severely chastised by the Command Officer, Headquarters Company, and the Sergeant Major, [of OCS] . . . , [Sergeant Major L.E. Wood], for his testimony of fact in the same board action. Although I was being retained at [OCS], I was not to be reinstated as the command's representative for [ADBs].

> *. . . I believe that actions of the type described above are thoroughly in conflict with the honor and justice system which the Corps is based on and serve only to make complacent cowards out of would-be professional Marines. When the very rights that the Armed Forces are established to preserve are hampered by undue influence from over-zealous commanders, we have defeated the very reason for our existence.* (emphasis added).

(JA 43-45.)

The Petitioner's contentions were fully supported by a number of the members of Cooper's command whose sworn statements were taken by COL Lawson during the investigation of Petitioner's Article 138 Complaint. In two statements dated on or about January 7 and February 16, 1983, Captain John W. Saul, a member of Cooper's staff at OCS, said that:

> On July 20, during a S-3 section meeting conducted by Major T.D. LABAR, immediately following an OCS staff meeting conducted by Colonel . . . COOPER, the other primary members of the S-3, and I were given some very unusual directions from Major LABAR. The directions came in the form of advice regarding our careers in the Marine Corps. Major LABAR indicated that we should not give credible testimony for our subordinates if our command was initiating an administrative or judicial action against them if we valued our careers. To impress the point upon us he cited a situation where another Marine Corps officer recently testified on behalf of one of his former troops at MCDEC and immediately fell into disfavor with his command. The inference was that Colonel COOPER didn't want any member of his command giving credible testimony in UCMJ adjudications, especially those initiated by OCS.

These directions by Major LABAR were shocking but not unexpected since they were consistent with the general repressiveness at OCS and were in keeping with the multitude of other negative policies initiated by Colonel COOPER which adversely affected the morale of OCS.

> . . . A conversation with Capt. C.E. HINDENBURG revealed that [the Petitioner's] recent transfer from OCS was due to the fact that [the Petitioner] failed to vote in accordance with the wishes of Colonel COOPER at an [ADB] of which he was a member. Capt. HINDENBURG stated that [Petitioner's] failure to vote correctly was 'the straw that broke the camel's back' and was responsible for his transfer. . . .[16]

Article 138 Package, p. 138.

Captain Saul made it very clear in his statements that people under Cooper's command were afraid to give statements during the Article 138 Complaint investigation because they "fear for their careers if they do not whole-heartedly support Colonel Cooper." *Id.* at pp. 139-140. Captain Saul, under oath, went on to state that:

> The Marines at OCS are correct to fear for their careers should they make a statement concerning undue command pressure. It is not misinterpretation of the commander's guidance by his field grade officers as some would have others believe.[17] It is incomprehensible that field grade officers would pass along instructions of this kind to their subordinates

---

[16] The statement given by Capt. Hindenburg to COL Lawson during the Article 138 Complaint investigation discusses only the Petitioner's removal from ADB duty, effective August 13, 1982. *See Article 138 Package*, p. 157. Hindenburg's statement is dated November 23, 1982, and was originally given to Colonel Cooper on November 23, 1982, and later incorporated by Lawson into the investigation on February 7, 1983. It is significant to note that despite the fact of Captain Saul's accusations about Captain Hindenburg on January 7, and again on February 16, 1983, Hindenburg never denied Saul's contentions about Petitioner's transfer from OCS as it was related to Saul by Hindenburg. Moreover, there is no evidence in the record that COL Lawson ever asked Captain Hindenburg about Captain Saul's accusations as to the reasons for Petitioner's transfer from OCS.

[17] This is precisely the conclusion reached by COL Lawson after investigating Petitioner's Article 138 Complaint. *See* (JA 71-72). Interestingly, Captain Saul made his correct observations two weeks prior to COL Lawson's final investigative report for General Twomey.

> out of blind loyalty to Colonel Cooper, but from all indications they did so from fear that their careers would be damaged should they not comply with Colonel Cooper's guidance. They relayed these instructions [to their subordinates] because it was part of their survival strategy at OCS.

Article 138 Package, p. 140. Captain Saul then went on to detail several instances of his "knowledge of events at OCS relative to undue command pressure and the fears of many Marines at OCS who declined to make statements concerning Colonel Cooper's administration [of his command]. . . . *Id.* at 140. None of Captain Saul's allegations was rebutted in any substantial manner by COL Lawson's investigative conclusions, despite their direct relationship to the claims made by the Petitioner in his Article 138 Complaint.

On February 19, 1983, Captain Kimberly L. Becker gave COL Lawson a sworn statement which she had previously submitted in early-January 1983. Captain Becker stated, in part, that:

> . . . [C]ommand pressure to discharge OCS Marines put before board actions appeared to be exerted on OCS personnel assigned to testify or adjudicate at these actions.
>
> . . . Maj. J.P. RIGOULOT, during February 1982, briefed all available Academics personnel on the information passed on at a meeting of field grade officers and Col. COOPER. The Major stated that Col. COOPER was extremely displeased with 1st Lt. C.G. WRIGHT's favorable character testimony in the recent court-martial of an OCS Marine. Maj. RIGOULOT further said the colonel considered it poor judgment to testify, in any capacity, on behalf of anyone before an adverse action. Moreover, the major said Col. COOPER wanted those field grade officers who had met with him to relay to those personnel under their purview his 'concern' at the outcome of the court-martial and with Lt. WRIGHT's testimony, and that in the future, OCS personnel testifying at or serving on any board action should weigh carefully their statements/actions with the command's intended objective. . . .

> . . . Word of 1st Lt. WRIGHT's counseling by Col. COOPER spread quickly around the command, primarily owing to 1st Lt. WRIGHT's answers to queries. His admissions, coupled with information passed [down] that same week [by the command] . . . caused concerned discussion (at least among company-grade officers) of possible repercussions on their fitness reports should their ethical obligations supercede the 'discharge dictum'. . . .
>
> . . . Due to the apparent command scrutiny in punitive/administrative discharge actions against OCS personnel, I was apprehensive in sitting on administrative discharge boards to which I was assigned. . . . I . . . request[ed] dismissal from OCS cases. My concern was that my fitness reports might suffer should I vote for retention of an OCS Marine. . .
>
> . . . On the day [the Petitioner] addressed with Col. COOPER the issue of his transfer [from OCS], various OCS Marines were aware the conversation was transpiring since the 'cause' for transfer was generally thought to be the [Petitioner's] voting contrary to the colonel's desires on board action. . . .
>
> . . . One final incident occurred between Capt. MOODY and Maj. R.M. PATTEN [one of Col. COOPER's immediate subordinates]. Following Capt. MOODY's board's decision in a court-martial of an OCS Marine, Maj. PATTEN lengthily questioned the captain on the case and why it went differently than desired/anticipated. Following their conversation, Capt. MOODY came to my office and expressed concern over the constant command attention to board actions and the continual need to justify/explain actions and results. . . . [There was an] unrelenting focus on punitive and administrative actions against OCS personnel *by the command's senior officers and the [Fitness Report] reporting and reviewing [officers] of board members, the latter called upon to justify or explain not only their own, but their board's actions, never knowing if those deciding their careers would be*

inquiring or accusatory, that placed (what I consider) pressure on board members to either conform to the 'discharge dictum' or be prepared to do some lengthy explication (which could prove unacceptable and potentially shorten or terminate their careers).

Article 138 Package, p. 186. (emphasis added).

Captain Becker's statement then went on to describe a number of instances of discrimination against women Marines that were in violation of Marine Corps, Department of the Navy and Department of Defense equal employment regulations and directives. In particular, she stated that:

> . . . Women Marines were not permitted to instruct Marine or candidate classes at NCOLS or OCS after August 1982. This policy appears sexist, illegal, and was highly demoralizing to those of us who had been OCS instructors previously. . . .
>
> . . . No pregnant women Marines were permitted to attend NCOLS after May 1982. . . . Again, this apparently is illegal and directly affects women's retention or promotion in the Corps . . . *(i.e.,* NCOLS counts 20 points toward promotion . . .).
>
> . . . [W]e discovered that Lt. FISHER's platoon . . . had won the battalion drill competition, but was to be denied the recognition. Maj. WADDELL . . . personally confirmed to Lt. FISHER and me that the women would not receive the honor due to their sex. Neither can a woman candidate hold the battalion or company honor graduate positions, nor can one hold any high level graduation parade positions other than the [personnel officer] or platoon level slots . . . during training, women candidates were not allowed to act as the Candidate Company Commander, the most senior company billet. . . .
>
> . . . [A]fter the graduation of the 120th [Officers Candidate Class], Maj. LABAR spoke with 1st Lt. FISHER and me regarding general officers' and Col. COOPER's concerns that 'too many incoming women Marines are "jocks," further asking what "recruitment policies" we "could or should" institute to enlist/commission "more feminine women."'

Id. at p. 187.

Finally, Capt. Becker told Col Lawson that:

> . . . It was discussed [between myself and Col. Lawson] that direct, linear communications might have led to the misconstruction of information allegedly passed by Col. COOPER *(i.e.,* during the transfer of information from one person to the next, it was altered accidentally, thereby creating misrepresentations). This decidely, I do not believe to be the case. Information at OCS was passed . . . in a pyramidal structure *(i.e.,* Col. COOPER to his branch heads, they to their junior/subordinate officers and enlisted).[18] When the latter groups compared information received, marked similarities were noted, indicating the information had not been altered from that allegedly originated by Col. COOPER.
>
> . . . It was discussed [between myself and Col. Lawson] that perhaps the field grade officers had gone a bit 'overboard' inadvertently in expressing the colonel's advice/guidance/directives. This I do not know; however, *a consistent point within the Marine Corps leadership doctrine is that the commander has ultimate responsibility for all his subordinates do or fail to do. See footnote 18, below.*[19]

Article 138 Package, p. 188. (emphasis added).

---

[18] In fact, as the Respondents and any military person knows, this is the classic definition of how the military "chain of command" is *required* to function. This concept of how information and orders flow from top to bottom is a classic example of military custom.

[19] This Court, in *In re Yamashita*, 327 U.S. 1 (1946), denied habeas corpus relief to General Yamashita who had been some 10,000 miles away from his troops when they committed atrocities. In upholding a death sentence, the Court held that a commander has "an affirmative duty to take such measures as were within his power and appropriate in the circumstances [to control the actions of his subordinates]. . . . This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals." *Id.* at 16 (footnote omitted).

Captain Becker's statement mentions the problems encountered by Lt. C. G. Wright for not following Col. Cooper's "guidance" regarding "correct" testimony and voting. In his statement to Col. Lawson during the Article 138 investigation, Lt. Wright stated that:

> . . . After testifying at a Court Martial on Sergeant DANIEL SOWMAN sometime in early 1982 . . . I was told that Colonel M. T. COOPER desired to see me. The Colonel wanted to know why I testified on Sergeant Sowman's behalf. . . . The Colonel thought that I didn't need to volunteer information and said he was rather disappointed in me. . . . Shortly after our talk the word was passed via [the Executive Officer, Maj. RIGOULOT] and principal staff officers . . . that Officers/SNCOs should consider carefully their testimony on behalf of drug abusers. One should tell the truth but subordinate/reconcile personal beliefs with the Commandant's desire to purge drug abusers from our ranks. It was inconceivable to [Col. COOPER] . . . that a[n NCO] or Officer could state that an individual with a documented history of drug abuse was worthy of retention and should not be discharged. It seemed some Officers/SNCOs were all too eager to testify on behalf of any drug abusers in direct defiance of [the Commandant of the Marine Corps'] policy. . . . As for [the Petitioner's] transfer [from Col. COOPER's command] . . . it was widely perceived that it was a direct result of his voting for retention of Staff Sergeant FREDERICK. . . .

Article 138 Package, p. 192.

Major R. M. Patten, one of Cooper's immediate subordinates, told Col. Lawson in a sworn statement that:

> Throughout 1982, I attended several weekly staff meetings, an Officer and SNCO class, and a field grade officers meeting in which Colonel COOPER . . . addressed the subject of testimony/ conduct at courts-martial or admin discharge boards. . . . On several occasions Colonel COOPER clearly stated that

> if we testified that 'excepting his misconduct, he was a good Marine,' or 'before this incident I held this Marine in high regard,' then that was okay. . . .

Article 138 Package, p. 195. This is a clear statement that Colonel Cooper was actually telling his subordinates what was permissible testimony, and what was not permissible testimony. Colonel Lawson, and the Respondents, could not have discovered more straightforward evidence of command influence than this. Captain Maxie W. Phillips told Colonel Lawson that his "Company Commander, Major G. A. Houle,[20] returned from a field grade officers' meeting and assembled Company C's staff to pass the word. During the course of the meeting Major Houle stated that *we should* avoid backing up Marines that are being tried by Court Martial for drug related offenses, or words to that effect. . . . *Article 138 Package*, p. 204. (emphasis added).

Without going into further detail, the preceding statements of Cooper's subordinates adequately supported Petitioner's 138 Complaints regarding command influence and the improper treatment of women Marines under Cooper's command at OCS. Many of the other sworn statements gathered by Col. Lawson during the investigation further backed up Petitioner's complaints against Cooper.

Petitioner was passed over for promotion in March, 1983, subjecting him to mandatory discharge on November 1, 1983, or as soon thereafter as he finished his physical disability processing. Petitioner filed an application for correction of his records, including the Article 138 Complaint Investigation, on June 23, 1983 (JA 83) with the Board for Correction of Naval Records ("BCNR").

Petitioner instituted this action on June 17, 1983. On June 27, 1983, the parties filed a joint stipulation agreeing to stay the district court action pending pursuit of administrative remedies before the BCNR. After a personal hearing before the BCNR, during which the Petitioner, and Captains Saul and Becker

---

[20] Major Houle was one of the officers whom Colonel Lawson found had, in fact, passed on improper information regarding testimony at ADBs and courts-martial. (JA 71-72, paras. 1-4.)

testified under oath, the BCNR denied relief and, among other rulings, stated that they had no jurisdiction to correct an Article 138 Complaint investigation because it was not a "military record" within the meaning of 10 U.S.C. Section 1552(a) (1982). No witnesses were presented by the Respondents at the BCNR hearing. The district court case was reinstated on October 31, 1983, when the BCNR denied relief to the Petitioner, determining, *inter alia*, that it did not have jurisdiction (JA 1), except to direct that steps be taken to locate a missing fitness report (which was missing, with another report, from the materials considered by both promotion selection boards). The BCNR's reasoning for refusing to review and correct the Article 138 Investigation conducted by the Respondents, even for constitutional and regulatory violations, was that the final investigation did not appear in the Petitioner's military personnel records. *Cert. Pet. App. at A-4.*[21] These conclusions were reached by the BCNR despite its finding that the Petitioner's transfer from Cooper's command may well have resulted from his displeasure at the Petitioner's voting on ADBs. The BCNR did, in fact, question Cooper's judgment and fairness in its decision. (JA 23). Yet, the BCNR determined that although the Petitioner's transfer from Cooper's command may have been retaliatory, no such motives were found in regard to the contested Fitness Reports that Cooper helped write and which led directly to Petitioner's passover for Major and subsequent involuntary separation from the Marine Corps after 16 years of valiant and impeccable service. (JA 23).

On December 6, 1983, the district court dismissed the Petitioner's Article 138 claims for lack of subject matter jurisdiction, and affirmed the judgment of the Respondent Secretary of the Navy, who acted through the BCNR. *Cert. Pet. App. at A-2.* Petitioner filed his appeal with the United States Court of Appeals for the District of Columbia on December 22, 1983. (JA 3).

---

[21] The Federal statute governing the duties of the BCNR states that they "may correct *any* military record of [the Navy or Marine Corps] . . . *when . . . necessary to correct an error or remove an injustice.*" 10 U.S.C. Section 1552(a) (1982). (emphasis added).

On May 31, 1985, the United States Court of Appeals for the District of Columbia transferred this action pursuant to 28 U.S.C. Section 1631 (1982) to the United States Court of Appeals for the Federal Circuit under the authority of the Federal Courts Improvement Act, 28 U.S.C. Section 1295(a)(2) (1982). *Van Drasek v. Lehman, et al.*, 762 F.2d 1065, 1067, 1072 (D.C.Cir. 1985). On January 23, 1986, the Federal Circuit Court of Appeals affirmed the district court in an unpublished *per curiam* decision adopting the trial court opinion of Judge Richey. Rehearing before the Federal Circuit was denied on April 1, 1986.

In August, 1986, a Petition for a Writ of Certiorari was filed in this Court, and Certiorari was granted on December 1, 1986.

SUMMARY OF ARGUMENT

The decisions of this Court establish time-honored history supporting the right of military personnel to seek protection of the Federal courts when appropriate to protect Constitutional rights. *See, e.g., Chappell v. Wallace,* 462 U.S. 296 (1983); *Secretary of the Navy v. Huff,* 444 U.S. 453 (1980); *Harmon v. Brucker,* 355 U.S. 579 (1958); *Burns v. Wilson,* 346 U.S. 137 (1953); *Wilkes v. Dinsman,* 48 U.S. (7 How.) 89 (1849), *after remand, Dinsman v. Wilkes,* 53 U.S. (12 How.) 390 (1851). Moreover, this Court has held on numerous occasions that judicial review should be restricted only when the Congress has legislated such restrictions. *Lindahl v. Office of Personnel Management,* ___ U.S. ___, 105 S.Ct. 1620, 1627 (1985); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967) (citation omitted). No such Congressional legislation exists to restrict non-damage Constitutional claims, and this Court has found such a claim to be nonjusticiable in only one case. In *Gilligan v. Morgan,* 413 U.S. 1 (1973), the district court was asked to exercise continuing regulatory jurisdiction over enlistment, training, discipline, equipping and purely discretionary activities of the National Guard. The Court concluded that "no justiciable controversy [was] presented," 413 U.S. at 11, because it was "difficult to conceive of an area of governmental activity in which the courts have less competence." *Id.* at 10. Even in this type of case, however, the Court stated that "it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be

accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel whether by way of damages or injunctive relief." *Id.* at 11-12. This rule has been clearly restated in two recent decisions of this Court. *Chappel v. Wallace*, 462 U.S. 296, 304 (1983); *Secretary of the Navy v. Huff*, 444 U.S. 453, 458 n. 5 (1980) *(per curiam)*. In the present case, the Court is asked only for non-damages relief in reviewing allegations of violations of Petitioner's Constitutional rights under the First and Fifth Amendments because he complained that his superiors had violated Federal law and their own regulations when they committed specific unlawful acts against the Petitioner and other members of his command.

The Petitioner filed a formal Complaint against his superiors pursuant to Article 138, U.C.M.J., 10 U.S.C. Section 938 (1982), and then attempted to have the Complaint reviewed by the Board for Correction of Naval Records, pursuant to 10 U.S.C. Section 1552(a) (1982). These particular administrative remedies have been found to be required by this Court, *Chappell v. Wallace*, 462 U.S. 296, 302-303 (1983), and they were the only administrative remedies available. Once a service-person has exhausted his or her available administrative remedies, Article 138 Complaints are directly reviewable in Federal Courts on either Federal question jurisdiction, or the Administrative Procedures Act. *See* [*Colson v. Bradley*, 477 F.2d 639 (8th Cir. 1973); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971); *Cortwright v. Resor*, 477 F.2d 245 (2d Cir. 1971); *United States ex rel. Berry v. Commanding General*, 411 F.2d 822 (5th Cir. 1969); *Allen v. Monger*, 404 F. Supp. 1081 (N.C. Cal. 1975); *Turner v. Calloway*, 371 F.Supp. 188 (D.D.C. 1974).] This is particularly true where the Article 138 Complaint has first been presented to the Board for Correction of Naval Records, whose proceedings have a settled case history of reviewability in the Federal courts under the APA. *See Heisig v. United States*, 719 F.2d 1153 (Fed. Cir. 1983); *Greig v. United States*, 640 F.2d 1261 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 907 (1982); *Powell v. Marsh*, 560 F.Supp. 636 (D.D.C. 1983); *Lord v. Lehman*, 540 F.Supp. 125 (E.D. Pa. 1982).

The Courts of Appeals have adopted several balancing tests applicable to constitutional challenges to military administrative decisions. A number of the Courts of Appeals and District Courts have adopted the test enunciated in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). *Williams v. Wilson*, 762 F.2d 357, 359 (4th Cir. 1985); *Pengaricano v. Llenza*, 747 F.2d 55, 60-61 (1st Cir. 1984); *Gonzalez v. Secretary of the Army*, 718 F.2d 926, 929-930 (9th Cir. 1983); *Rucker v. Secretary of the Army*, 702 F.2d 966, 969-970 (11th Cir. 1983); *Niezner v. Mark*, 684 F.2d 562, 563-564 (8th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *Lindenau v. Alexander*, 663 F.2d 68, 71 (10th Cir. 1981); *Williams v. United States*, 541 F.Supp. 1187 (E.D.N.C. 1982); *benShalom v. Secretary of the Army*, 489 F.Supp. 964 (E.D. Wis. 1980); *Cushing v. Tetter*, 478 F.Supp. 960 (D.R.I. 1979). The Federal Circuit has favorably cited the *Mindes* test without specifically adopting it, *Williams v. Secretary of the Navy*, 787 F.2d 552, 558-559 n. 8 (Fed. Cir. 1986), and the Sixth Circuit has apparently not decided one way or the other. In *Mindes, supra*, the court said that the soldier must first allege a deprivation of a constitutional right or violation of a Federal statute or military regulation, and that exhaustion of military remedies is necessary. 453 F.2d at 201. Once these thresholds have been met, the reviewing court must then weigh four factors in determining whether to review the military decision being challenged: (1) the nature and strength of the plaintiff's challenge to the military determination; (2) the potential injury to the plaintiff if review is refused; (3) the type and degree of anticipated interference with military functions; and (4) the extent to which the exercise of military expertise or discretion is involved. *Mindes, supra*, 453 F.2d at 201-202. Assuming that the *Mindes* test is adopted by this Court, the Petitioner more than met all requirements for judicial review. However, given this Court's holdings favoring judicial review of governmental action absent Congressional intent to specifically deny review, the *Mindes* test is too restrictive and should not be adopted as the balancing test to apply when soldiers allege deprivations of Constitutional rights, or violations of Federal law or military regulations.

This Court should adopt a test similar to that fashioned in *Dillard v. Brown*, 652 F.2d 316 (3d Cir. 1981), and by the Court of Appeals and the District Court for the District of Columbia in cases such as *Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979), *clarified*, 627 F.2d 407 (D.C. Cir. 1980), and *Owens v. Brown*, 455 F.Supp. 291 (D.D.C. 1978).

The lack of meaningful review of Petitioner's Article 138 Complaint outside his chain-of-command and the uniformed military is underscored by the BCNR's abdication of its statutorily mandated responsibility under Federal law: "The Secretary of a military department . . . acting through boards of civilians . . . , may correct *any* military record of that department when he considers it necessary to correct an error or remove an injustice." *10 U.S.C. Section 1552(a)(1982)*(emphasis added). In the instant case, the BCNR refused to review Petitioner's Article 138 Complaint either procedurally or substantively. *Joint Appendix, Van Drasek v. Lehman, et al.*, No. 86-319 (U.S.Sup.Ct.) at pp. 18-20.[22] The BCNR ruled that the "record of proceedings under Article 138, UCMJ is not a matter properly before the Board. In that regard, the Board particularly notes that this record of proceedings does not appear in Petitioner's military personnel record. . . . The Board adopts the position stated by the attorney-advisor assigned to this case (see transcript of oral hearing, enclosure 3, pp. 6 and 7)." *SCJA at p. 18.* The BCNR took the position, noted above, that because the Article 138 proceedings weren't in Petitioner's official military personnel record, they were not "any military record" within the meaning of 10 U.S.C. Section 1552(a) (1982). This position flies in the face of both logic and the plain meaning of the language in the statute. The word "any" has one simple meaning that any rational person should have no problem understanding. No recitation to caselaw is necessary to support the well-known rule of statutory construction that words in statutes, like constitutional provisions, must be given their plain meaning. Moreover, in cases of constitutional interpretation, the customary deference granted to an agency's interpretation, of its own regulations is inappropriate. *Salvail v. Nashua Board of Education*, 469

---

[22] Hereinafter referred to as "SCJA at p. ____."

F.Supp. 1269 (D.N.H. 1979). At a minimum, this Court should remand this case to the District Court with an order that the BCNR review the Article 138 Complaint for procedural and substantive correctness.

The courts below were also in error when they found that the Petitioner did not have standing to raise complaints of wrongs done to other members of his command by their mutual commanding officer. These claims dealt with sex discrimination against women Marines that were raised by the Petitioner, and by persons interviewed by the Article 138 Complaint investigator. Both Article 138, UCMJ, and 10 U.S.C. Section 5947 (1982), gave Petitioner standing to have these other issues considered during the course of his Article 138 Complaint investigation. Not only do the plain meaning of the words contained in 10 U.S.C. Section 5947 (1982) make this patently clear, but this law has been implemented by the Respondents in one of their own regulations. *See NAVREGS 1105.1* (the appropriate language of both the Federal statute and the Respondent's regulation is produced at footnote 15, *ante).*

Finally, the courts below were in error when they ruled that the APA, specifically 5 U.S.C. Section 701(b)(1)(F) (1982), precluded judicial review of the Article 138 Complaint. That section applies only to "courts martial and military commissions," and is, thus, totally inapplicable to the instant case. An Article 138 Complaint investigation, and decisions of the BCNR, are not covered by the quoted language. This Court has squarely held that a "military commission" is actually "the . . . war court," used to try civilians during time of war. *Madsen v. Kinsella*, 343 U.S. 341, 345-347, n.9 (1952). Thus, the Courts below were clearly in error when they refused to review the Article 138 Complaint on its merits, or to tell the BCNR that they acted improperly when they ruled that an Article 138 Complaint investigation was not a military record within the meaning of 10 U.S.C. Section 1552(a) (1982). *See Cert. Pet. App. at A-5, A-7.*

ARGUMENT

I

MILITARY PERSONNEL SHOULD NOT BE DENIED JUDICIAL REVIEW WHEN SEEKING ONLY EQUITABLE RELIEF FOR CONSTITUTIONAL, STATUTORY, OR REGULATORY VIOLATIONS COMMITTED BY THEIR SUPERIOR OFFICERS.

This Court has never held that military personnel have no access to the Federal courts when seeking review of military determinations that impinge on Constitutional rights. To the contrary, this Court has a history of reviewing such claims that dates back almost to the Nation's beginning. *See, e.g., Wilkes v. Dinsman,* 48 U.S. (7 How.) 89 (1849), *after remand Dinsman v. Wilkes,* 53 U.S. (12 How.) 390 (1851);[23] *Burns v. Wilson,* 346 U.S. 137 (1953); *Harmon v. Brucker,* 355 U.S. 579 (1958); *Secretary of the Navy v. Huff,* 444 U.S. 453 (1980) *(per curiam); Chappell v. Wallace,* 462 U.S. 296 (1983); *Goldman v. Weinberger,* ___ U.S. ___, 89 L.Ed.2d 478 (1986). Moreover, without ever questioning the Federal judiciary's power to review Constitutional, statutory and regulatory violations of the military departments, this Court has ruled on the merits in many such cases. *Goldman v. Weinberger, supra* (First Amendment freedom of religion attack on military regulation); *Chappell v. Wallace, supra* (First and Fifth Amendment Bivens-type claims for race discrimination); *Secretary of the Navy v. Huff, supra* (First Amendment challenge to Navy and Marine Corps regulations concerning circulation of petitions to members of Congress); *Brown v. Glines,* 444 U.S. 348 (1980) (First

[23] *Wilkes v. Dinsman,* concerned an enlisted Navy man's claim for damages against his commanding officer for having him illegally flogged and imprisoned. The officer was sued for damages under a common law theory and the Court held that the officer could be found liable under such a theory. Despite this Court's later rulings that the military could not be held liable for damages that occurred while a person was on active duty because of immunity granted under the Federal Tort Claims Act, *see Feres v. United States,* 340 U.S. 135 (1950); *Chappel v. Wallace,* 462 U.S. 296 (1983), the *Wilkes* decision has been distinguished on the grounds that the case "involved a well-recognized common law cause of action . . . and did not ask the Court to imply a new kind of cause of action." *Chappell v. Wallace, supra,* 462 U.S. at 305 n. 2.

Amendment challenge to Army regulations requiring commander's approval prior to circulating petitions); *Schlesinger v. Ballard,* 419 U.S. 498 (1975) (Fifth Amendment equal protection claim for gender Amendment equal protection claim for gender discrimination caused by Federal statute); *Middendorf v. Henry,* 425 U.s. 25 (1976) (Fifth and Sixth Amendment attacks on military's failure to provide counsel for summary courts-martial); *Parker v. Levy,* 417 U.S. 733 (1974) (vagueness and overbreadth challenge to Federal statute); *Frontiero v. Richardson,* 411 U.S. 677 (1973) (Fifth Amendment equal protection challenge to Federal law resulting in gender discrimination); *Harmon v. Brucker, supra* (due process challenge to Army discharge regulation); *Orloff v. Willoughby,* 345 U.s. 83 (1953) (due process and Fifth Amendment self-incrimination challenge to Federal statute and military personnel decisions); *Burns v. Wilson,* 346 U.S. 137 (1953) (habeas corpus attack on court-martial conviction under Fifth Amendment due process analysis); *Ex parte Reed,* 100 U.S. 13 (1979) (habeas corpus relief available to review courts-martial convictions).

In three recent decisions of this Court, it has been made clear that, under appropriate circumstances, members of the armed forces may seek Federal course review for constitutional wrongs suffered in the course of military service. In *Gilligan v. Morgan,* 413 U.S. 1 (1973), the Petitioners had sought expansive court monitoring of the activities of the Ohio National Guard in the aftermath of the Kent State student killings by Guard members. *Id.* at 5. Although the Court ultimately held the matter to be non-justiciable because it would require a court to assume continuing regulatory jurisdiction over Guard activities, *id.* at 5-12, the Court forcefully stated that:

> In concluding that no justiciable controversy is presented, it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, . . . by way of injunctive relief.

Id. at 11-12. In *Secretary of the Navy v. Huff, supra,* the servicemen sought declaratory and injunctive relief, on First Amendment grounds, against future enforcement of four Navy and

Marine Corps regulations requiring military personnel at overseas bases to obtain command approval before circulating petitions addressed to members of Congress. 444 U.S. at 454-457. Although upholding the military's actions, the Court noted that:

> A member of the service who thinks that his commander has misapplied . . . regulations can seek remedies within the service. *See, e.g.*, Uniform Code of Military Justice, Art. 138, 10 U.S.C. Section 938. Furthermore, the federal courts are open to assure that, in applying the regulations, commanders do not abuse the discretion necessarily vested in them.

Secretary of the Navy v. Huff, supra, 444 U.S. at 457-458 n. 5.

Most recently, in *Chappell v. Wallace, supra,* this Court again confirmed access to the Federal courts by military personnel, particularly where non-damages relief is sought for alleged violations of Constitutional, statutory, or regulatory rights. The Petitioners in *Chappell* had filed suit against their superior officers in a *Bivens*-type action for monetary damages, alleging that they had been discriminated against because of their race. The Court held that such actions could not lie for damages for the same reasons as those enunciated in *Feres v. United States,* 340 U.S. 135 (1950): the Government was immune under the Federal Tort Claims Act, in combination with "the unique relationship between the Government and military personnel . . . , 'the peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline . . .'" *Chappell, supra,* 462 U.S. at 299, *quoting United States v. Muniz,* 374 U.S. 150, 162 (1963) and *United States v. Brown,* 348 U.S. 110, 112 (1954). However, the Court in *Chappell* noted that the Petitioners had failed to avail themselves of intra-service administrative remedies—Article 138 Complaints and military records corrections pursuant to 10 U.S.C. Section 1552(a) (1982). 462 U.S. at 302-303. The Court then went on to state that:

> Chief Justice Warren had occasion to note that 'our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.' Warren, *The Bill of Rights and the Military,* 37 N.Y.U.L.Rev. 181, 188 (1962). This Court has never held, nor do we now hold, that military personnel are barred form all redress in civilian courts for constitutional wrongs suf-fered in the court of military service. . . .]

Chappell, supra, 462 U.S. at 304-305. (citations omitted)

The best analysis of the relationship between this Court's decision in *Chappell* and judicial review of military decisions where the soldier seeks injunctive relief and not damages, was recently accomplished in *Jorden v. National Guard Bureau,* 799 F.2d 99 (3d Cir. 1986). The *Jorden* court correctly observed that although "damage claims" by soldiers against their superiors would not be heard by Federal courts, "[t]he clear implication of *Chappell* is that ... some non-damage constitutiona. claims involving the military remain viable. . . ." 799 F.2d at 107. The *Jorden* court then went on to state that:

> *Chappell* made no direct reference to claims for injunctive relief against the military, but it did cite *Brown* [*v. Glines, supra*], Parker [*v. Levy, supra*], and *Frontiero* [*v. Richardson, supra*], as examples of suits against the military that remain viable. 462 U.S. at 304-05. . . . Three years after *Chappell,* the Court heard another case involving a claim for injunctive relief in the military context, and made no mention of a reviewability problem. *Goldman v. Weinberger,* ___ U.S. ___, 89 L.Ed.2d 478 (1986). . . .
>
> This court, too, has entertained suits for injunctive relief against the military. . . .
>
> • • • • •
>
> [T]he Court in *Brown [v. Glines, supra],* expressly stated that judicial scrutiny was not limited to facial constitutional challenges; rather, legitimate constitutional claims could arise from the application of the . . . statutes and regulations [governing the military]. 444 U.S. at 357 n. 15. ... The recent *Goldman* case involved such a challenge.
>
> All of the courts to consider the question have held that *Chappell* leaves open claims by discharged military personnel for injunctive relief. *Ogden v. United States,* 758 F.2d 1168 (7th Cir. 1985);

Penagaricano v. Llenza, 747 F.2d 55 (1st Cir. 1984); *Gant v. Binder*, 596 F.Supp. 757 (D.Neb. 1984), *aff'd.*, 766 F.2d 358 (8th Cir. 1986) .

Jorden, supra, 799 F.2d at 109. (citations and footnote omitted) Finally, although the *Jorden* court affirmed the district court's dismissal of the damage claims under *Chappell*, it reversed and remanded on the constitutional challenge seeking only injunctive relief in the form of reinstatement in the National Guard. *Id.* at 111. The *Jorden* court reasoned that:

> . . . Jorden alleges that he was discharged in violation of his constitutional rights. . . . [I]f Jorden establishes a constitutional violation, the remedy will be a court-ordered reinstatement, rather than the kind of ongoing judicial oversight held inappropriate in *Gilligan [v. Morgan*, 413 U.S. 1 (1973)]. . . . Jorden's claims for reinstatement are reviewable.
>
> • • • • •
>
> . . . [O]n remand, if Jorden can demonstrate that the discharge violated his constitutional rights, he is entitled to reinstatement.

Jorden, supra, 799 F.2d at 111. (citations omitted)

This Court's own decisions, as well as cases such as *Jorden, Ogden, Penagaricano* and *Gant*, stand for the clear proposition that claims such as those raised in the instant case may be reviewed by Federal courts.

II

THE COURTS BELOW ERRED AS A MATTER OF LAW IN RULING THAT THEY LACKED SUBJECT MATTER JURISDICTION TO REVIEW PETITIONER'S COMPLAINT, FILED PURSUANT TO ARTICLE 138, UNFORM CODE OF MILITARY JUSTICE, 10 U.S.C. SECTION 938 (1982), WHICH ALLEGED THAT HIS SUPERIOR COMMANDING OFFICERS VIOLATED HIS RIGHTS UNDER THE FIRST AND FIFTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

A. Only Upon A Showing Of Clear And Convincing Evidence Of A Contrary Legislative Intent Should The Courts Restrict Judicial Review

This Court has "often noted that 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.' *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141... (1967) (citation omitted)." *Lindahl v. Office of Personnel Management*, ___ U.S. ___, 105 S.Ct. 1620, 1627 (1985). In the military context, Congress has not restricted judicial review of non-damage Constitutional claims by military personnel. Moreover, Congress' intent to restrict such review would be clearly legislated. For instance, 38 U.S.C. Section 211(a) (1982) forbids any review, by any court, on any ground, "on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents and survivors. . . ." As to the type of "case and controversy," *see Flast v. Cohen*, 392 U.S. 83, 94-95 (1968), raised by the Petitioner in the instant case, no such statutory restriction exists now, or has ever existed. The fact that non-damage Constitutional questions are reviewable is clearly exemplified by Congress' grant of sovereign immunity as to damage claims against the military that is found in the Federal Tort Claims Act. *See Chappell v. Wallace, supra*, 462 U.S. at 298-300. Clearly, if congress had intended at any time to bar judicial access in non-damage claims, they would have so stated. As this Court recently noted, "[a]bsent more compelling indicia of congressional intent—whether from [some] overall statutory structure or . . . legislative history—we thus believe . . . that '"[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others."'"

Lindahl, supra, 105 S.Ct. at 1628-1629. Thus, great weight must be afforded Congress' inaction over the past 40 years as to the numerous Federal court decisions that have found non-damage Constitutional claims by military personnel to be justiciable.

This Court has found review of non-damage claims to be nonjusticiable in only one case. In *Gilligan v. Morgan,* 413 U.S. 1 (1973), the district court was asked to exercise continuing regulatory jurisdiction over enlistment, training, discipline, equipping and purely discretionary activities of the Ohio National Guard. This Court concluded that "no justiciable controversy [was] presented," 413 U.S. at 11, because it was "difficult to conceive of an area of governmental activity in which the courts have less competence." *Id.* at 10. In fact, *Gilligan* is the only case since *Baker v. Carr,* 369 U.S. 186 (1962), in which this Court has invoked the political question doctrine to hold an issue nonjusticiable. Tribe, *American Constitutional Law 78 (1978).* As Professor Tribe correctly noted:

> Plaintiffs [in *Gilligan]* had asked the federal courts to evaluate under the fourteenth amendment due process clause the training of the Ohio National Guard; if that training was found constitutionally deficient, they sought appropriate injunctive relief. The Supreme Court's decision that the issue was nonjusticiable turned on a number of factors; chief among them, however, were the facts that article 1, Section 8, authorized Congress to engage in just such supervision, and that judicial review in this area would be essentially standardless: '[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* [Court's emphasis] to civilian control of the Legislative and Executive Branches.'

Tribe, *supra,* at 78-79, *quoting Gilligan, supra,* 413 U.S. at 10. However, the Court made it plain in *Gilligan* that even the National Guard was not beyond the reach of the Federal courts under appropriate facts:

> [I]t should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review of that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel whether by way of damages or injunctive relief.

Id. at 11-12. As noted in Argument I, *ante,* this forceful admonition has recently been twice repeated by this Court in *Chappell* and *Secretary of the Navy v. Huff.* Finally, the justiciability/political question ruling in *Gilligan* is best understood as correct because of the extreme and unmangeable remedy sought by the plaintiffs: "a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard." 413 U.S. at 5. The Petitioner here seeks no such remedy. Vindication of violations of his and others' Constitutional rights by equitable remedies would require no such "continuing regulatory jurisdiction" over the Respondents in this case. Petitioner seeks no extreme or unmanageable remedy. To the contrary, the remedy sought here would enhance the military and have the effect of restoring correct discipline, as well as simply forcing the Respondents to obey the mandates of the Constitution, Federal law and their own regulations. The courts here were asked only for non-damages injunctive relief in reviewing allegations of violations of Petitioner's Constitutional rights under the First and Fifth Amendments because he complained that his superiors had violated Federal law and their own regulations when they committed specific unlawful acts against the Petitioner and other members of his command. Under any measure of the law, these claims are justiciable in the Federal courts.

B. Article 138 Complaints Are Directly Reviewable In Federal Court Once A Serviceperson Has Exhausted All Intra-military Administrative Remedies

The Petitioner filed a formal Complaint against his superiors pursuant to Article 138, U.C.M.J., 10 U.S.C. Section 938 (1982), and then attempted to have the Complaint reviewed by the Board for Correction of Naval Records, pursuant to 10 U.S.C. Section 1552(a) (1982). These particular administrative remedies have been found to be required by this Court, as well as other Federal courts, prior to seeking judicial review. *Chappell v. Wallace, supra,* 462 U.S. at 302-303; *Muhammad v. Secretary of the Army,*

770 F.2d 1494, 1495-1496 (9th Cir. 1985); [*Ogden v. United States*, 758 F.2d 1168, 1177-1178 (7th Cir. 1985)] *Fairchild v. Lehman*, 609 F.Supp. 287 (E.D. Va. 1985). Both of these remedies were exhausted in the present case, and, thus, Petitioner's claims "are judicially reviewable." *Stanley v. United States*, 574 F.Supp. 474 (S.D. Fla., N.D. 1983), *affirmed* 786 F.2d 1490 (11th Cir. 1986), *cert. granted*, ___ U.S. ___, 55 U.S.L.W. 3405 (Dec. 9, 1986). As one court recently stated:

> Congress has enacted an intricate scheme of administrative remedies to handle the grievances of military personnel. . . . The Uniform Code of Military Justice, 10 U.S.C. 938 [is one such remedy]. . . . This statute has been held applicable to the grievances of the Marine Corps. . . . *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969). While a discretionary denial of relief under 10 U.S.C. Section 938 is not reviewable in district court, failure to respond to a serviceman's invocation of these procedures *or failure to properly follow the procedures set forth in the statute is reviewable. Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969). (emphasis added).

Ayala v. United States, 624 F.Supp. 259, 262-263 S.D.N.Y. (1985). The *Ayala* court then went on to say that there could be further review by "a civilian review board [BCNR], which operates pursuant to 10 U.S.C. Section 1552, whose function is to review applications for the presence of an error or injustice and make recommendations for corrective action. . . . Unlike the remedy afforded under 10 U.S.C. Section 938, the proceedings of the BCNR are subject to judicial review and can be overturned. . . . *Chappell v. Wallace, supra*, 462 U.S. at 303. . . ." *Ayala, supra*, 524 F.Supp. at 263. Clearly then, if servicemen seek Article 138 relief, and then proceed to the BCNR and are still dissatisfied, they may seek judicial review. BCNR proceedings—the responsibility of the Respondents Lehman and Cox—have a settled case history of reviewability in the Federal courts under the Administrative procedures Act. *See Heisig v. United States*, 719 F.2d 1153 (Fed. Cir. 1983); *Grieg v. United States*, 640 F.2d 1261 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 907 (1982); *Powell v. Marsh*, 560 F.Supp. 636 (D.D.C. 1983); *Lord v. Lehman*, 540 F.Supp. 125 (E.D. Pa. 1982).

Numerous courts have reviewed Article 138 Complaints, with and without further proceedings by a corrections board. *See Colson v. Bradley*, 477 F.2d 639 (8th Cir. 1973); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971); *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969); [*United States ex rel. Barry v. Commanding General*, 411 F.2d 822 (5th Cir. 1969);] *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969); *Cushing v. Tetter*, 478 F.Supp. 960 (D.R.I. 1979); *Hickey v. Commandant of Fourth Naval Dist.*, 461 F.Supp. 1085 (E.D. Pa. 1978); *Allen v. Monger*, 404 F.Supp. 1081 (N.D. Cal. 1975); *MacKay v. Hoffman*, 403 F.Supp. 467 (D.D.C. 1975); *Turner v. Calloway*, 371 F.Supp. 188 (D.D.C. 1974). Without question, then, the courts below erred when concluding they lacked subject matter jurisdiction over Petitioner's Article 138 Complaint after he had also pursued relief before the BCNR.

C. Assuming The Test Enunciated In *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), Is The Proper Balancing Test Applicable To Constitutional Challenges To Military Administrative Decisions, The Instant Case Meets The Test.

The Courts of Appeals have adopted several balancing tests applicable to Constitutional challenges to military administrative decisions. Many Courts of Appeals and District Courts have utilized the test enunciated in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). *Williams v. Wilson*, 762 F.2d 357, 359 (4th Cir. 1985); *Penagaricano v. Llenza*, 747 F.2d 55, 60-61 (1st Cir. 1984); *Gonzalez v. Secretary of the Army*, 718 F.2d 926, 929-930 (9th Cir. 1983); *Rucker v. Secretary of the Army*, 702 F.2d 966, 969-970 (11th Cir. 1983); *Niezner v. Mark*, 684 F.2d 562, 563-564 (8th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *Lindenau v. Alexander*, 663 F.2d 68, 71 (10th Cir. 1981); *Williams v. United States*, 541 F.Supp. 1187 (E.D.N.C. 1982); *benShalom v. Secretary of the Army*, 489 F.Supp. 964 (E.D. Wis. 1980); *Cushing v. Tetter*, 478 F.Supp. 960 (D.R.I. 1979). The Federal Circuit has favorably cited *Mindes* without specifically adopting it, *see Williams v. Secretary of the Navy*, 787 F.2d 552, 558-559 n.8 (Fed. Cir. 1986), and the Second and Sixth Circuits have apparently not decided one way or the other.

In *Mindes, supra*, the court said that the soldier must first allege a deprivation of a constitutional right or violation of a Federal statute or military regulation, and that exhaustion of

military remedies is necessary. 453 F.2d at 201. Once these thresholds have been met, the reviewing court must then consider four factors in deciding whether to review the military decision being challenged on the merits: (1) the nature and strength of the plaintiff's challenge to the military determination; (2) the potential injury to the plaintiff if review is refused; (3) the type and degree of anticipated interference with military functions; and (4) the extent to which the exercise of military expertise or discretion is involved. *Mindes, supra,* at 201-202. Assuming that this Court adopts the *Mindes* test as the correct analysis to determine the justiciability of non-damage Constitutional claims of military personnel, the Petitioner more than meets the requirements for judicial review based on the facts of the instant case.

The *Mindes* test was used in *Chappell v. Wallace,* 661 F.2d 729 (9th Cir. 1981), *rev'd on other grounds,* 462 U.S. 296 (1983), with the recognition that the plaintiffs had not exhausted their intra-service remedies under Article 138, U.C.M.J., 10 U.S.C. Section 938 (1982), and 10 U.S.C. Section 1552(a) (1982). *See Chappell, supra,* 462 U.S. at 302-303. The *Mindes* test has not been adopted by the United States Court of Appeals for the District of Columbia, although in *VanderMolen v. Stetson,* 571 F.2d 617, 624 (D.C. Cir. 1977), the court cited *Mindes* for the principle that "actions by an agency of the executive branch in violation of its own regulations are illegal and void. . . ." *See Owens v. Brown,* 455 F.Supp. 291 (D.D.C. 1978). Despite the historical reluctance by the courts to intercede in military decision-making, and despite the stringency of the *Mindes* test, the strength of the Petitioner's claim for judicial review in this case is, indeed, compelling in its satisfaction of all elements of the test. *Cf. Van Drasek v. Lehman, et al.,* 762 F.2d 1065 (D.C.Cir. 1986, *cert. granted,* ___ U.S. ___, 107 S.Ct. 567 (1986) ("Van Drasek's claim for monetary relief is far from frivolous," *Id.* at 1071).

Captain Van Drasek has asserted that the Article 138 Complaint investigation violated the Due Process Clause of the Fifth Amendment; that his First Amendment right to free expression was chilled by Colonel Cooper's biased fitness reports, and by the command influence exerted by Colonel Cooper; that his removal from the ADB and his transfer violated 10 U.S.C. 837 and MCDEC Order 5210.1; and that his promotion passovers, being a result of biased fitness reports and an incomplete promotion

package, requiring his discharge constituted a deprivation of property rights in violation of the Due Process Clause of the Fifth Amendment. As these are all violations of some constitutional rights, some statute, or some regulations, they satisfy the first *Mindes* requirement. Since Captain Van Drasek has exhausted his administrative remedies, he has satisfied both initial *Mindes* requirements. *Navas, supra,* 752 F.2d at 769; *Mack v. Rumsfeld,* 609 F.Supp. 1561, 1563 (W.D.N.Y. 1985); *Wronke v. Marsh,* 603 F.Supp. 407, 410 (C.D.Ill. 1985), *rev'd and remanded,* 787 F.2d 1569 (Fed. Cir. 1986), *cert. denied,* 107 S.Ct. 188 (1986).

The basic nature of Captain Van Drasek's claims is that statutes and regulations promulgated for the protection of service-members were violated on numerous levels by Colonel Cooper and by the officers involved in processing Petitioner's Article 138 and BCNR requests. Violated were: Marine Corps Equal Opportunity guidelines; the statute prohibiting command influence, 10 U.S.C. 837; regulations providing for the orderly transfer of personnel, MCDEC Order 5210.13C, 5210.1; procedures for investigation and redress of wrongs done to service members, Article 138, 10 U.S.C. 938 *(see Amended Verified Complaint,* paragraphs 32-45, 52-57, 63, 66, 68-87); regulations for the determintion of promotion, SECNAVINST 1420.1, p. 4, paragraphs 5(g)(3) and 5(i)(2). The foregoing violated Captain Van Drasek's First Amendment right to free expression and his Due Process rights under the Fifth Amendment. These are important charges, and since they involve the Navy's own regulations and Congressional legislation protecting service members' rights, they are fully capable of supporting judicial review.

If judicial review is refused, the consequences to Captain Van Drasek and to the Navy and Marines are serious. Refusal to review would reinforce the following types of conduct which have occurred in this case: superior officers could continue to exercise pressure over military courts and boards; the chain-of-command could fail to conduct a proper and legal investigation of such acts; the Secretary of the Navy could approve improper and illegal investigations; retaliatory acts can be taken against those who make official complaints of such acts; none of these will be reviewable by either the BCNR or the federal courts. Refusal to review also would have a "chilling effect" on service members' freedom of expression, especially in light of the fact that the

suppressed speech here was made to bring the Corps into compliance with its own regulations. Personally, Captain Van Drasek, one of the few officers of his own rank to have combat experience in Viet Nam, has lost a career he valued highly, and he lost it because he was so honorable as to act against those things which diminished it. These are just the type of consequences the *Mindes* test is used to prevent. *Gonzales v. Department of the Army*, 718 F.2d 926, 930 (9th Cir. 1983); *Cortright v. Resor*, 447 F.2d 245, 251 (2d Cir. 1971). In discussing *Mindes*, the *Wronke* court stated that, "[r]eview is particularly appropriate where a challenged action is alleged to have violated a particular service's own regulations." 603 F.Supp. at 411.

The type and degree of interference with military functions in this case is an important factor. What a decision in Captain Van Drasek's favor would require is an order that the Navy and Marines comply with all applicable regulations and statutes in considering Captain Van Drasek's claims; in other words, that Respondents obey the law. Captain Van Drasek's claims are that numerous regulations and statutes promulgated specifically for the protection of service members' rights were violated in the process of a service member invoking their protection.

In particular the underlying allegation of command influence, is a long recognized problem that is especially unsuited to be left to military self-control.

> [The legislative history of the Uniform Code of Military Justice reveals that . . . Congress intended to reduce the level of command control over the military justice system. The Congress believed that public confidence in the fairness of military justice would be promoted by establish-ment as the highest tribunal in the military justice system a court composed of civilians who would not be controlled by the Secretary of Defense or by any of the branches of the military service. *Mundy v. Weinberger*, 544 F.Supp. 811, 820-21 (D.D.C. 1982).]

The district court recognized that military personnel may not be "'stripped of basic rights simply because they have doffed their civilian clothes.' E. Warren, *The Bill of Rights & the Military*, 37 N.Y.U.L. Rev. 181, 188 (1962). *See also Chappell*, 103 S.Ct. at 2367-68; *Parker*, 417 U.S. at 758. Civilian courts have the power to oversee certain aspects of the military justice system . . ." (J.A. 10-11).

The last *Mindes* factor to be considered is the extent to which military expertise and discretion are involved. Captain Van Drasek has not requested the Court to substitute its expertise or discretion in peculiarly military matters. If the Court finds that Captain Van Drasek's claims of violations in the Article 138 investigation were correct, a task which the Court was created to perform and is well-qualified to do, then he is asking that the Court issue orders appropriate to those findings, and therefore the military's discretion would not be interfered with at all.

D. The *Mindes* Test Is Too Restrictive Where The Remedies Sought Against The Military Involve Injunctive Relief, Declaratory Judgment, Or Mandamus Relief, And The Court Is Not Required To Exercise Continuing Regulatory Jurisdiction Over Enlistment, Training, Discipline, Equipping And Purely Discretionary Activities Of The Military Such As That Requested In *Gilligan v. Morgan*, 413 U.S. 1 (1973).

Given this Court's holdings favoring judicial review of governmental action absent Congressional intent to specifically deny or restrict review, the *Mindes* test is too restrictive and should not be adopted as the balancing test to be applied when soldiers allege deprivations of Constitutional rights, or violations of Federal law or military regulation, by their superiors. This seems particularly logical where, as here, the Petitioner seeks only equitable types of relief. *Mindes* appears unduly restrictive because the Petitioner alleges violations of the Constitution as well as Federal statutes, and military regulations. Thus, facially, the requirements of 28 U.S.C. Section 1331 (1982), are satisfied. Various courts have held that jurisdiction over military decisions under such circumstances when a plaintiff contends that the military unlawfully failed to follow its own regulations, and such courts have not required the restrictive balancing required by *Mindes* prior to review. *See e.g., Woodard v. Marsh*, 658 F.2d 989 (5th Cir. 1981); *Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981); *Dillard v. Brown*, 652 F.2d 316, 319 (3d Cir. 1981); *Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979); *Crawford v. Cushman*, 531 F.2d 1114, 1120 (2d Cir. 1976); *Tufts v. Bishop*, 551 F.Supp. 1048, 1050 (D. Kan. 1982). The restrictive nature of *Mindes* is pointed out in *Tufts v. Bishop, supra*, which applied *Mindes* to grant review:

> Plaintiff's claim is obviously very serious, since she contends defendants knowingly denied her the protec-

tion of laws and regulations *designed to assist her in the administrative prosecution of her discrimination claim. The potential injury to plaintiff, if review is refused, is great, because plaintiff has no other forum in which to pursue a remedy for denial of her constitutional rights.* [emphasis added].

. . . [P]laintiff's case does not appear to present any serious impairment to the performance of vital military duties. Lastly, plaintiff's case does not appear to present a situation where a significant exercise of military expertise or discretion is involved, for the regulations [and Federal statute] allegedly violated by defendants are clear.

* * * * *

[Finally,] . . . plaintiff's complaint does not appear to be an attempt to disguise a common tort as a constitutional violation to skirt the *Feres* doctrine [and the recent decision in *Chappell v. Wallace, supra*].

Tufts v. Bishop, supra, at 1051. Clearly, where claims such as those made in *Tufts* and the instant case are alleged, an extremely restrictive balancing test can only serve to deny access to the Federal courts in cases that will result in "the fox guarding the henhouse."

E. The Appropriate Balancing Test To Cases Such As Petitioner's Is A Combination Of The Rules Devised In *Dillard v. Brown,* 652 F.2d 316 (3d Cir. 1981), *Dilley v. Alexander,* 603 F.2d 914 (D.C. Cir. 1979), and *Owens v. Brown,* 455 F.Supp. 291 (D.D.C. 1978)

(i) There Is Not Present In This Case Either The Level Of Intrusion Into The Responsibilities Of The Military, Nor The Lack Of Competence Of The Judiciary, That Was Found To Exist In *Gilligan v. Morgan, Supra*

(ii) The *Mindes* Test Improperly Intertwines The Concept Of Justiciability With The Standards To Be Applied To The Merits Of The Case

This Court should adopt a test similar to that fashioned in *Dillard v. Brown,* 652 F.2d 316 (3d Cir. 1981), and by the Court of Appeals, and the District Court for the District of Columbia, in cases such as *Dilley v. Alexander,* 603 F.2d 914 (D.C. Cir. 1979), *clarified,* 627 F.2d 407 (D.C. Cir. 1980), and *Owens v. Brown,* 455 F.Supp. 291 (D.D.C. 1978). In *Dillard, supra,* the Court properly rejected the *Mindes* test because "it intertwines the concept of justiciability with the standards to be applied to the merits of the case." 652 F.2d at 323. The *Dillard* court correctly noted that *Gilligan, supra,* and *Orloff v. Willoughby,* 345 U.S. 83 (1953)), "established the basic parameters for determining the justiciability of challenges brough against the military." *Dillard, supra,* at 323. The *Dillard* court then held that "[o]nce a claim falls within these parameters, a Court should review the claim on the merits." *Id.* at 323. Moreover, the *Dillard* court correctly analyzed *Gilligan* and *Orloff* as requiring no more than allowance of latitude to military discretion and, having done so, "a constitutional challenge brought against the military, which does not require a court to run the military, is justiciable." 652 F.2d at 320-322. A similar analysis was applied in *Owens v. Brown,* 455 F.Supp. 291, 299-303 (D.D.C. 1978). In that case, the court correctly stated that simply because they should "exercise a large measure of self restraint," *id.* at 300, prior to reviewing military decisions, this did not

> of necessity compel the courts to abdicate their responsibility to decide cases and controversies merely because they arise in the military context. Contrary to [the Government's] assertion, the deserved margin of latitutde afforded the political branches of government in rendering military judgments seems *as a general matter* [court's emphasis] to figure more prominently into whether particular decisions are lawful than into whether they are susceptible to review at all. Whether the deference due particular military determinations rises to the level of occasioning nonreviewability is a question that varies from case to case and turns on the degree to which the specific determinations are laden with discretion and the likelihood that judicial resolution will involve the courts in an inappropriate degree of supervision over primary military activities.

455 F.Supp. at 300. (citations omitted)

In the present case, considering the serious allegations of command influence and retaliation against the Petitioner for exercising his Constitutional rights, the military's discretion in reviewing his Article 138 Complaint was narrow and limited by Federal statute and their own regulations. Judicial resolution of the military's determinations as to the propriety of the Complaint's investigation and the merits of Petitioner's allegations, would hardly involve "the court . . . in an appropriate degree of supervision over primary military activities."

The District of Columbia court has recently noted that, "'while the District of Columbia Circuit has not rejected the *Mindes* test by name, it has rejected the notion that a court should conduct a preliminary screening of military cases to determine which are appropriate for judicial review.'" *Benvenuti v. Department of Defense*, 587 F.Supp. 348, 354 n. 6 (D.D.C. 1984), *quoting* Note, *Judicial Review of Constitutional Claims Against the Military*, 84 Col L. Rev. 387, 403 (1984) (citing *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979), and *Knehans v. Alexander*, 566 F.2d 312 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 995 (1978)). In *Dilley v. Alexander*, *supra*, after reviewing *Orloff v. Willoughby*, *supra*, and its progeny, the court noted the "special circumstances in which the military must operate" and the amount of discretion to be allowed the military when "needed to establish and maintain a well-trained and well-disciplined armed force." 603 F.2d at 920 (citation omitted). However, the *Dilley* court went on to hold what should, by now, be plainly understood by all Federal courts when reviewing government agency decisions not specifically disallowed by act of the Congress:

> This logic is wholly inappropriate, however, when a case presents an issue that is amenable to judicial resolution. Specifically, courts have shown no hesitation to review cases in which a violation of the Constitution, statutes, or regulations is alleged. . . . It is a basic tenet of our legal system that a government agency is not at liberty to ignore its own laws and that agency action in contravention of applicable statutes and regulations is unlawful. . . . *The military departments enjoy no immunity from this proscription.* . . . It is the duty of the federal court to inquire whether an action of a military agency conforms to the law, or is instead arbitrary, capricious, or contrary to

> conforms to the law, or is instead arbitrary, capricious, or contrary to statutes and regulations governing that agency. . . . The logic [of this] . . . derives from the self-evident proposition that the Government must obey its own laws. 603 F.2d at 920 (citations omitted). (emphasis added)

Neither the special circumstances of military life, nor training or discipline, would have been in any way affected had the courts below reviewed Petitioner's claims on the merits. To the contrary, review and a ruling in the Petitioner's favor, as to command influence, sex discrimination and the substance of his Article 138 Complaint, could only have served to enhance the military society by showing the lower ranks that even colonels can, and when appropriate should, be disciplined. The type of test formulated by *Dillard*, *Dilley* and *Owens*, was recently reaffirmed in *Jorden v. National Guard Bureau*, 799 F.2d 99 (3d Cir. 1986). As noted by a recent commentator, "*Dillard* . . . [is a] superior approach to Mindes" and the *Dillard*-type test should be adopted by this Court. *Jorden*, *supra*, 799 F.2d at 111 n. 16, *citing* Note, *supra*, 84 Col. L. Rev. 387, 403 420 n. 189-190, 423-434 (1984).

In *Jorden*, *supra*, the court applied the *Dillard* analysis and succinctly stated why applying a test like that in *Mindes* is not only too restrictive, but historically incorrect:

> ['[S]uits against the military are non-cognizable in federal court only in the rare case where finding for the plaintiff "require[s] a court to run the military. . . ."' Absent such an extreme case, "if the military justification outweights the infringement of the plaintiff's individual freedom, we may hold for the military *on the merits*, but we will not find the claim to be non-justiciable . . ." (court's emphasis).']" *Jorden*, *supra*, 799 F.2d at 111 *quoting Dillard*, *supra*, 652 F.2d at 322-324. Thus, instead of a complicated test such as that found in *Mindes*, the only question a Federal court should inquire of is whether it would end up having to "run the military" should it review a case on the merits.

III

WHERE, IN THE COURSE OF INVESTIGATING PETITIONER'S ARTICLE 138 COMPLAINT, THE MARINE CORPS UNCOVERED OTHER ALLEGATIONS OF WRONGDOING BY HIS SUPERIOR COMMANDING OFFICER, THE PETITIONER HAD STANDING, PURSUANT TO ARTICLE 138, AND 10 U.S.C. SECTION 5947 (1982), TO VINDICATE HIS OWN RIGHTS AS WELL AS THE RIGHTS OF OTHER MARINES

Captain Van Drasek filed an Article 138 Complaint. Captain Van Drasek followed all the procedures provided by Ch. 11, NAVREGS, paragraph 1106, in making his complaint on behalf of other Marines, and submitted this written report as a part of his Article 138 Complaint presenting the wrongs Colonel Cooper did to him personally.

Article 138 of the UCMJ, 10 U.S.C. Section 938 provides:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Captain Van Drasek clearly used the correct procedure to present the wrongs done to him by a superior officer.

The Navy, by its regulations, requires all "persons in the Department of the Navy [to] report to proper authority offenses committed by persons in the Department of the Navy which come under (their) observation." *Paragraph 1139, NAVREGS (1973).* In addition, 10 U.S.C. Section 5947 (1982), codified by the Navy at paragraph 1102, NAVREGS (1973), orders all officers "in authority" . . . *to guard against and suppress all dissolute and immoral practices and to correct . . . all persons who are guilty of them"* (emphasis added). Ch. 11, NAVREGS, paragraphs 1101-1106, 1109 and 1139, allow Captain Van Drasek to submit a complaint on behalf of pregnant Marines, of oppressed members of Administrative Discharge Boards, and of any persons dissuaded from testifying on behalf of another due to the command influence exercised by Colonel Cooper. *(See* App. pp. 12-16.)

Since all Naval Regulations, and particularly the NAVREGS, have "the sanction of law," *paragraph 1201, NAVREGS (1973), Ex Parte Reed,* 100 U.S. 13 (1879), military administrative decisions or actions which result in violations such as those alleged by Captain Van Drasek are reviewable, and Captain Van Drasek has standing to complain.

IV

THE ADMINISTRATIVE PROCEDURES ACT, 5 U.S.C. SECTIONS 551 *et seq.* (1982), DOES NOT PRECLUDE JUDICIAL REVIEW OF MILITARY ADMINISTRATIVE DECISIONS

The courts below were in error when they ruled that the APA, specifically 5 U.S.C. Section 701(b)(1)(F) (1982), precluded judicial review of Petitioner's Article 138 Complaint. That section applies only to "courts-martial and military commissions," and is, thus, totally inapplicable to the instant case. An Article 138 Complaint investigation, and decisions of the BCNR, are not covered by the quoted language in 5 U.S.C. Section 701(b)(1)(F) (1982).

The APA allows judicial review of agencies, meaning "each authority of the Government of the United States." *5 U.S.C. Section 701(a).* Further, the APA provides that an "agency" subject to judicial review does not include "court-martial and military commissions." *5 U.S.C. 701(b)(1)(F).* Article 138, 10 U.S.C. Section 938 (1982), as implemented by Ch. XI, *Manual of the Judge Advocate General,* Sections 1101-1114, does not provide for a formal court-martial to be convened, nor does it anywhere mention "military commission." While a "court of inquiry" or "board of officers" might arguably be reckoned a "military commission," they are, in fact, mere advisory boards. Whichever course the officer exercising general court-martial

jurisdiction originally takes, he must "arrange to be advised of the results of the consideration of the complaint" by such bodies, and upon receipt of such advice, "shall complete his consideration of the complaint in light thereof, and shall proceed" to forward the complaint for redress by proper authority. *JAG-MAN Section 1104(a).* Thus, it is this officer who retains primary jurisdiction to act upon the complaint, not the "court of inquiry" or the "board of officers," and the individual could not properly be deemed a "military commission" or "court-martial." Further, both "court-martial" and "military commission" refer to very specific military bodies.

The Supreme Court accepted Colonel William Winthrop's distinctions in *Madsen v. Kinsella,* 343 U.S. 341, 345-347, n.9 (1982):

> The *Occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offices [sic] defined in a written code. It does not extend to many criminal acts especially of civilians, peculiar to time of war; and for the trial of these a different tribunal is required.... Hence, in our military law, the distinctive name of *military commission* has been adopted for the exclusively war-court . . . (emphasis in original) (Citing Winthrop, *Military Law and Precedent* (2nd Ed. 1920) at p. 831).

By explicitly excluding some military administrative bodies from judicial review, the language of the Act implies that other military administrative bodies' decisions will be judicially reviewable. The APA only explicitly excludes decisions and proceedings of the above bodies, and decisions made by "military authority exercised in the field in time of war or in occupied territory," from review. *5 U.S.C. Section 701(b)(1)(G).* It does not exclude any other military decision from review; the APA does not exclude Article 138 proceedings from judicial review.

V

10 U.S.C. SECTION 1552(a) (1982) CONFERS UPON THE BOARDS FOR CORRECTION OF MILITARY RECORDS JURISDICTION TO REVIEW INVESTIGATIONS OF ARTICLE 138 COMPLAINTS FOR PROCEDURAL AND SUBSTANTIVE CORRECTIONS

The lack of meaningful review of Petitioner's Article 138 Complaint outside his chain-of-command and the uniformed military is underscored by the BCNR's abdication of its statutorily mandated responsibility under Federal law: "The Secretary of a military department . . . acting through boards of civilian . . ., may correct *any* military record of that department when he considers it necessary to correct an error or remove an injustice." *10 U.S.C. Section 1552(a) (1982).* (emphasis added). In the instant case, the BCNR refused to review Petitioner's Article 138 Complaint either procedurely or substantively. SCJA at pp. 18-20. The BCNR ruled that the "record of proceedings under Article 138, UCMJ is not a matter properly before the Board. In that regard, the Board particularly notes that this record of proceedings does not appear in Petitioner's military personnel record. . . . The Board adopts the position stated by the attorney-advisor assigned to this case (see transcript of oral hearing, enclosure 3, pp. 6 and 7)." *SCJA at p. 18.* The BCNR took the position, noted above, that because the Article 138 proceedings weren't in Petitioner's official record, they were not "any military record" within the meaning of 10 U.S.C. Section 1552(a) (1982). This position flies in the face of both logic and the plain meaning of the language in the statute. The word "any" has one simple meaning that any rational person should have no problem understanding.

It is well settled that it is generally assumed that Congress expresses its purpose through the ordinary meaning of the words it uses. *Escondido Mut. Water Co. v. LaJolla Band of Mission Indians,* 466 U.S. 765 (1984); [*In re Canadian Pacific Ltd.,* 754 F.2d 992 (Fed. Cir. 1985);] *National Ass'n of Broadcasters v. F.C.C.,* 740 F.2d 1190 (D.C. Cir. 1984); *Block v. Smith,* 583 F.Supp. 1288 (D.D.C. 1984), *affirmed in part, reversed in part,* 793 F.2d 1303 (D.C. Cir. 1986), *cert. denied,* 106 S.Ct. 3335 (1986). Moreover, in determining the scope of a Federal statute, the court looks first to its language and, if that language is unam-

biguous, in the absence of a clearly expressed legislative intent to the contrary, the language must ordinarily be regarded as conclusive. North Dakota v. United States, 460 U.S. 300 (1983); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *United States v. Turkette*, 452 U.S. 576 (1981). Finally, although an agency's interpretation of a statute under which it operates is entitled to some deference, such deference is constrained by the Federal Courts' obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). In cases of constitutional interpretation, the customary deference granted to an agency's own interpretation of its own regulations or governing statutes is inappropriate. *Salvail v. Nashua Board of Education*, 469 F.Supp. 1269 (D.N.H. 1979). Thus, because the Respondents have totally failed to demonstrate that Congress' intent in use of the words "any military record" meant only official personnel records, the courts below, and the BCNR, were bound to apply the words in 10 U.S.C. Section 1552(a) (1982) according to their plain meaning. *U.S. Lines, Inc. v. Baldridge*, 667 F.2d 940 (D.C. Cir. 1982). At a minimum, this Court should remand this case to the District Court with an order that the BCNR review the Article 138 Complaint investigation for procedural and substantive correctness. In this regard, it is well-settled in the lower courts that "the BCNR is empowered to redress claims of Constitutional violations as well as the more routine inquiries into intro-military conflicts . . ." (citation omitted). *Ayala v. United States*, 624 F.Supp. 259 (S.D.N.Y. 1985). *Accord, Williams v. Secretary of the Navy*, 787 F.2d 552, 559 (Fed. Cir. 1986); *Baxter v. Claytor* 652 F.2d 181, 185 n.3 (D.C. Cir. 1981); *Neal v. Secretary of the Navy*, 639 F.2d 1029, 1042-1044 (3d Cir. 1981); *Bard v. Seamans*, 507 F.2d 765 (10th Cir. 1974); *Benvenuti v. Department of Defense*, 587 F.Supp. 348, 355-356 (D.D.C. 1984). Thus, the BCNR was clearly in error when they ruled that they had no power to review Petitioner's claims of procedural and substantive Constitutional violations during the Article 138 Complaint investigation.

CONCLUSION

The judgment of the United States Court of Appeals for the Federal Circuit, insofar as it affirmed the unpublished decision of the United States District Court for the District of Columbia, dismissing the Petitioner's complaint for lack of subject matter jurisdiction, should be reversed.

Respectfully submitted,

STEPHEN G. MILLIKEN, ESQUIRE
Milliken, Van Susteren & Canan, P.C.
511 E Street, N.W.
Washington, D.C. 20001
(202) 393-7676

STUART A. STEINBERG, ESQUIRE
Veterans Outreach Services, Inc.
P.O. Box 747
Greenfield, MA 01302
(413) 773-3651

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to Charles Fried, Solicitor General, Department of Justice, Washington, D.C. 20530, this 3rd day of February, 1987.

STEPHEN G. MILLIKEN

STUART A. STEINBERG, ESQUIRE
Veterans Outreach Services, Inc.
Vietnam Veterans Outreach Center
P.O. Box 747
Greenfield, MA 01302
(413) 773-3651

STEPHEN G. MILLIKEN, ESQUIRE
Milliken, Van Sustern & Canan, P.C.
511 E Street, N.W.
Washington, D.C. 20001
(202) 393-7676

Attorneys for Petitioner

No. 86-319

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN R. VAN DRASEK, PETITIONER

v.

JOHN F. LEHMAN, SECRETARY OF THE NAVY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

MICHAEL K. KELLOGG
Assistant to the Solicitor General

RICHARD A. OLDERMAN
CHARLES R. GROSS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

KEITH T. SEFTON
Lt. Col., USMC
Office of the Judge Advocate General
Department of the Navy
Alexandria, Va. 22332

QUESTION PRESENTED

Whether the district court erred in declining to review petitioner's Complaint of Wrongs, filed pursuant to Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and regulations:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-319

JOHN R. VAN DRASEK, PETITIONER

v.

JOHN F. LEHMAN, SECRETARY OF THE NAVY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. A1) is unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit transferring the appeal to the Federal Circuit (Pet. App. A9-A18) is reported at 762 F.2d 1065. The opinion of the district court (Pet. App. A2-A8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1986, and a petition for rehearing

was denied on April 1, 1986. On July 8, 1986, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 29, 1986. The petition was filed on August 28, 1986, and was granted on December 1, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938, provides as follows:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

The pertinent regulations in effect at the time of petitioner's Article 138 Complaint, including Chapter 11 of the Manual of the Judge Advocate General of the Navy (JAGMAN) and Chapter 11 of the Navy Regulations (Navy Regs.), which are lengthy, have been lodged with the Court as a separate Regulatory Appendix (Reg. App.).

STATEMENT

1. Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938, is one of several mechanisms

designed by Congress to handle the grievances of military personnel. Article 138 provides that any member of the armed forces "who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress," may file a complaint with a superior commissioned officer. The latter must forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom the wrongs are alleged. The officer exercising general court-martial jurisdiction must then "examine into the complaint and take proper measures for redressing the wrong complained of."

In August, 1982, petitioner was on active duty as a Captain in the United States Marine Corps. He was assigned to the Officer Candidates School (OCS) in Quantico, Virginia. The OCS is a subordinate command to the Marine Corps Development and Education Command (MCDEC) in Quantico. J.A. 8.

Petitioner served at OCS in a variety of positions. For a time, he was also the OCS representative on an Administrative Discharge Board (ADB). J.A. 8-9. An Administrative Discharge Board is a board of Marine officers constituted to decide whether a Marine should be recommended for separation before the expiration of his enlistment. The Board hears testimony and considers documentary evidence, then votes whether to recommend discharge or retention. If the Board recommends discharge, it also suggests the proper characterization of service (honorable, general, or other than honorable). Petitioner had been appointed by the Commanding General of MCDEC to serve as the OCS representative on an ADB for the period from July 1 to December 31, 1982 (J.A. 9).

On August 10, 1982, the commanding officer of OCS, Colonel M. T. Cooper, ordered petitioner transferred from OCS to another command within MCDEC (J.A. 10). Two days later, another officer was named to replace petitioner as the OCS representative on the ADB (*ibid.*). On August 13, petitioner met with Colonel Cooper and convinced him to allow petitioner to remain at OCS; the order concerning petitioner's transfer was thereupon cancelled (*ibid.*). Two days later, however, petitioner suffered a severe leg fracture while parachuting, and Colonel Cooper again ordered his transfer, effective September 28 (*ibid.*).

On September 29, 1982, petitioner initiated a Complaint of Wrongs under Article 138 against Colonel Cooper. Petitioner's Complaint described what he perceived to be a general attitude and morale problem at OCS, which petitioner claimed was due, at least in part, to the "illegal and immoral" conduct of Colonel Cooper. Record of Proceedings, Article 138 Complaint 41 (Art. 138 Rec.). More specifically, petitioner charged Colonel Cooper with using his influence as a commanding officer to keep subordinates from providing favorable character evidence for OCS Marines who were defendants at courts-martial and administrative discharge proceedings (*id.* at 41-42). Petitioner further alleged that officer members of ADBs had been pressured to vote in accordance with Colonel Cooper's personal wishes (*ibid.*).

Petitioner indicated in his Complaint that he himself had never succumbed to improper command pressure with respect to his votes on the ADB. He did claim, however, that he had been chastised by Colonel Cooper's Executive Officer for voting to retain a particular OCS Marine despite Colonel Cooper's recommendation that the Marine be discharged (Art. 138 Rec. 42). Petitioner further alleged that he had been transferred from OCS, and in consequence removed as the OCS representative on the ADB, in retaliation for the way he had voted during his three-month tenure on the Board (*id.* at 42-43).

Petitioner's Complaint was submitted to the Commanding General of MCDEC, Colonel Cooper's immediate superior. On October 6, 1982, the Commanding General responded to petitioner, noting that his charges of undue command influence did not appear to be a proper subject for an Article 138 Complaint, but instead should be pursued by the alternative method of "request mast" (Art. 138 Rec. 40).[1] He further advised petitioner that the Complaint was not in the proper format (*ibid.*). As required by regulations (JAGMAN 1108e; Reg. App. 7), however, the Commanding General also advised petitioner that despite these defects he could have his Article 138 Complaint forwarded if it was amended to contain, inter alia, a statement of the specific relief desired (Art. 138 Rec. 40).

On October 8, 1982, petitioner restated his grievances and expressed his continuing desire to avail himself of the Article 138 process (Art. 138 Rec. 37-39). His restatement of grievances was substantially

[1] "Request mast" is a nonstatutory means by which members of the Navy and Marine Corps may request an opportunity to meet with a superior in the chain of command to air a grievance. Although "request mast" is designed to achieve resolution at the lowest possible level, a dissatisfied Marine can pursue this remedy to increasingly senior commanders. With few exceptions, the commander from whom "mast" has been requested may not refuse to consider the requestor's complaint. Navy Regs. 1107, Reg. App. 14; Marine Corps Order 1700.23C (Apr. 27, 1983).

the same as his original Complaint, except for the addition (*id.* at 39) of the following paragraph:

> 7. The relief I desire in this matter is: First, that this matter be investigated in accordance with [the JAGMAN]; second, that appropriate administrative action be taken to assure this situation does not occur in the future (see enclosed statement).

In the statement enclosed with this resubmission, petitioner noted that reassignment to OCS was "not a preferable [form of] relief" for him because he believed his effectiveness there would be hindered as a result of his perceived "lack of command loyalty" (*id.* at 44).

In accordance with regulations (JAGMAN 1103 (c), 1106(d); Reg. App. 4, 6-7), Colonel Cooper received petitioner's revised Article 138 Complaint and filed a rebuttal to petitioner's charges (Art. 138 Rec. 29-34). Colonel Cooper admitted making comments to his staff about providing testimony at courts-martial and before ADBs. He stated, however, that these comments were part of wide-ranging staff briefings, and he considered them to be only in the nature of "professional guidance" to the junior officers under his command. *Id.* at 29-30. Colonel Cooper denied ever having threatened anyone, counseled anyone, or taken action against anyone in his command for their participation in courts-martial or ADBs (*id.* at 30). Colonel Cooper further explained that petitioner had been transferred from OCS because of general dissatisfaction with his performance (*id.* at 30-33).

Attached to Colonel Cooper's rebuttal were statements from several of his staff officers. These statements disputed petitioner's contention that there was a morale problem at OCS. They also supported Colonel Cooper's claim that petitioner's transfer from

OCS and consequent removal from the ADB were not the product of petitioner's vote in any particular ADB proceeding. Art. 138 Rec. 45-49.

When the Commanding General received petitioner's revised Complaint and Colonel Cooper's rebuttal, he concluded that the rebuttal added "substantial comments and new factual matter" to the issues raised in the Complaint. As a result, on December 1, 1982, the Commanding General referred Colonel Cooper's endorsement back to petitioner so that he might provide material or comment in surrebuttal. Art. 138 Rec. 27. Because petitioner believed that the issues had been complicated by Colonel Cooper's comments, he requested and received assistance from a military lawyer in formulating his response (*id.* at 28).[2]

On January 14, 1983, petitioner provided his response, a seven-page, point-by-point surrebuttal containing 29 attachments. The attachments included statements by other individuals supporting petitioner's allegations of improper command influence and documents offered to rebut allegations that petitioner's performance of duty at OCS had been other than exemplary. Art. 138 Rec. 20-26. Petitioner also amended his Complaint with a demand for additional relief: "I request from Colonel Cooper a formal, written apology for and a retraction of all adverse matter affecting me" (*id.* at 26).

---

[2] In accordance with JAGMAN 1107 (Reg. App. 7), petitioner was allowed to consult with a Judge Advocate to obtain advice concerning the submission of his Article 138 Complaint. However, again in accordance with regulation, this lawyer was not considered to be "representing" petitioner in the attorney-client sense of that word (*ibid.*). Petitioner was also entitled to retain civilian counsel (*ibid.*), but apparently he did not do so until review of his Article 138 Complaint had been completed (Art. 138 Rec. 4-5).

2. The Commanding General directed Colonel Curtis G. Lawson to conduct a "comprehensive preliminary inquiry and report into [petitioner's] complaint" (Art. 138 Rec. 92-93). On February 28, 1983, Colonel Lawson submitted a 22-page report, containing 26 attachments in addition to the 36 exhibits that were already part of the file (*id.* at 95-116). Among these attachments were statements from 22 individuals, including expanded or explanatory statements from many of the individuals who had earlier provided statements to petitioner and Colonel Cooper (*id.* at 133-163, 179-181, 186-242). Colonel Lawson's report contained specific findings of fact, with citations to supporting evidence, and made recommendations concerning three separate issues: petitioner's transfer from OCS, his removal as a voting member of the ADB, and his allegations about the exertion of improper command influence by Colonel Cooper in ADB proceedings and courts-martial.

After reviewing and weighing the evidence, Colonel Lawson concluded (1) that petitioner's transfer from OCS had not been improper but in fact had been planned prior to petitioner's appointment to the ADB; (2) that petitioner's removal from the ADB, although accomplished in an administratively incorrect manner, was precipitated by his transfer from OCS and was not in retaliation for his vote in any particular ADB proceeding; and (3) that, while the OCS command was highly sensitive to adverse rulings in courts-martial and ADB proceedings, Colonel Cooper had not exerted any "official or formal improper command pressure." Art. 138 Rec. 99-103, 103-107, 107-116. Colonel Lawson did note, however, that some members of OCS had misconstrued

the command's sensitivity and felt themselves discouraged from providing favorable character evidence on behalf of defendants in courts-martial and administrative discharge proceedings (*id.* at 115-116). Colonel Lawson also observed that some members of ADBs believed that their votes were subject to undue scrutiny from their superiors (*ibid.*). Colonel Lawson, therefore, recommended that steps be taken to eliminate these perceptions (*id.* at 116).

The Commanding General accepted Colonel Lawson's findings and concluded that petitioner "has neither wrongfully suffered any detriment, harm, or injury as a result of any improper action by Colonel Cooper nor does he seek redress which is cognizable under the provisions of [Article 138 and JAGMAN]" (Art. 138 Rec. 12). The Commanding General concluded that petitioner's transfer from OCS was not improperly motivated, and that petitioner was removed from the ADB simply because of his impending transfer from OCS, not because of his vote in any particular case (*id.* at 13). The Commanding General specifically noted that, when the administrative irregularities involved in petitioner's removal from the ADB were discovered, those irregularities were corrected and petitioner was returned to duty on the ADB. In fact, petitioner continued to serve on the ADB even after his transfer from OCS insofar as his medical condition permitted. *Ibid.*

In keeping with Colonel Lawson's recommendations, the Commanding General also issued directives concerning the general operation of the OCS command. First, the Commanding General directed that "proper administrative practices [be] followed with regard to the nomination, appointment, and relief of members of administrative discharge boards" (Art. 138 Rec. 14). Second, the Commanding General di-

rected Colonel Cooper to "ensure that his subordinate leaders fully understand the prohibition against improper interference with judicial and administrative proceedings and * * * ensure that personnel who serve on courts and boards are not improperly questioned with regard to the performance of these duties. In addition, members of the organization will be advised that their participation in judicial or administrative proceedings is not the subject of improper scrutiny" (*ibid.*). Finally, the Commanding General adverted to a statement made by Captain Becker, a witness in the Article 138 investigation, concerning alleged discrimination by Colonel Cooper against women Marines at OCS. Although this claim formed no part of petitioner's Complaint of Wrongs and, therefore, was not specifically investigated as part of the Article 138 proceeding, the Commanding General ordered that this allegation be brought to Colonel Cooper's attention, with the direction that policies concerning women Marines at OCS be formalized in accordance with regulations concerning the treatment of women in the armed forces. *Id.* at 14-15.

On April 25, 1983, the Judge Advocate General of the Navy reviewed the entire Article 138 proceeding in order to ensure substantial compliance with Article 138 and applicable regulations (see JAGMAN 1113a.(1)(a); Reg. App. 8). The Judge Advocate General agreed with the determinations made by the Commanding General and recommended that no further action be taken on petitioner's Complaint (Art. 138 Rec. 8-9). On May 17, 1983, the Secretary of the Navy concurred (J.A. 9).

3. Meanwhile, in March, 1983, while his Article 138 Complaint was still pending, petitioner was con-

sidered but not selected for promotion to Major (J.A. 12). Petitioner had previously been passed over for promotion in April, 1982 (J.A. 9), three months before he was appointed to serve on the ADB and five months before he filed his Article 138 Complaint. Since the March, 1983, decision marked the second time that petitioner had been passed over for promotion to the rank of Major, he was subject to mandatory discharge from the Marines under the "up or out" rule set forth in 10 U.S.C. 632.

Petitioner brought this suit in the United States District Court for the District of Columbia on June 17, 1983 (J.A. 1). The relief sought included a temporary restraining order preventing his discharge from the service and a declaration that his rights under Article 138, the First and Fifth Amendments, the JAGMAN and the Navy Regulations had been violated. Petitioner also sought a declaration that he had standing to use Article 138 to enforce the rights of third-party members of the Naval Service; a declaration that Colonel Lawson had inadequately investigated Captain Becker's allegations of discrimination against female OCS Marines; a declaration that Colonel Lawson's investigation into petitioner's Complaint and the record of that investigation were in violation of Article 138, the JAGMAN and other Navy Regulations; and a writ of mandamus ordering a new investigation into petitioner's Complaint, carried out by someone not associated with MCDEC. Petitioner also asked the district court to order the Navy to rewrite its regulations governing the processing of Article 138 Complaints so as to make military counsel available to assist complainants. Complaint 41-43 (June 17, 1983).

Petitioner's district court pleadings also advanced several employment-related claims that he had not raised in his Article 138 Complaint. He alleged that two of his performance evaluations were the result of bias and did not accurately reflect his conduct of his duties. He challenged his having been twice passed over for promotion as attributable, in part, to those biased evaluations. He challenged his involuntary discharge from the Marine Corps, which, because of his two passovers, was scheduled for no later than November 1, 1983. And he requested back pay stemming from his allegedly wrongful nonselection for promotion. Complaint 38-40, 41-42 (June 17, 1983).

On June 25, 1983, with the court's approval, the parties agreed (J.A. 2) to stay the proceedings in the district court while petitioner pursued available remedies for his employment-related claims with the Board for the Correction of Naval Records (BCNR). The focus of the BCNR's consideration was to be petitioner's allegations involving his performance evaluations, his two passovers for promotion, and his impending involuntary discharge that was predicated upon those passovers. Joint Stipulation 2. The BCNR also undertook to examine matters raised in petitioner's Article 138 Complaint to the extent that such matters were relevant to petitioner's employment-related claims (J.A. 19-20).

On November 7, 1983, after considering petitioner's application for relief, the 66 exhibits attached to it, testimony from petitioner and others, and advisory opinions from several specialized offices within the Marine Corps, the BCNR issued its opinion (J.A. 6-20). The BCNR declined to amend or to remove from petitioner's records the two performance evaluations that he challenged, finding no reason

to conclude that those reports were not fair and accurate (J.A. 19). The BCNR further concluded that petitioner's two promotion passovers were neither erroneous nor unjust, and specifically found to be groundless petitioner's allegation that his second passover was in retaliation for his Article 138 Complaint (J.A. 19-20). The BCNR, therefore, recommended no relief except that efforts be made to locate a 1980 performance evaluation that was found to be missing from petitioner's file (J.A. 20). On November 9, 1983, the Assistant Secretary of the Navy for Manpower and Reserve Affairs approved the BCNR's decision (*ibid.*).[3]

On November 10, 1983, petitioner filed an amended complaint in the district court. In order to preserve the district court's jurisdiction over his back-pay claim (see 28 U.S.C. 1346(a)(2)), petitioner amended that claim to waive all monetary relief in excess of $9,999.99. Amended Complaint 50-51 (Nov. 10, 1983). In all other respects, the prayers for relief in the two complaints were the same.

4. On December 6, 1983, the district court granted judgment for respondents (Pet. App. A2-A8). First, with respect to the Article 138 claim, the court held

---

[3] Although petitioner had been slated for discharge by November 1, 1983, in the interim it had become apparent to the Marine Corps that petitioner, because of his medical condition, might be entitled to retirement with a ratable service-connected disability instead. See 10 U.S.C. 1201 *et seq.* As a result, the Secretary of the Navy ordered petitioner's discharge held in abeyance while he underwent the necessary physical evaluations. See 10 U.S.C. 640. In any event, on October 31, 1983, when it was evident that the BCNR would not act before November 1, and despite the ongoing disability proceedings, petitioner asked for and the district court granted a temporary restraining order preventing his discharge. J.A. 2-3.

petitioner's First and Fifth Amendment objections to be insubstantial, concluding "that the processing of [his] Article 138 complaint comport[ed] with constitutional requirements" (*id.* at A6). The court determined that "[t]he investigation, report of findings, and remedial action satisf[ied] the minimum standards of procedural due process," and that petitioner's "allegations of [F]irst [A]mendment violations similarly do not warrant relief" (*ibid.*). The court concluded, however, that it "[could] not reexamine the substance of the Article 138 decision," by which the court appeared to mean the evaluation of evidence, factual findings, and remedial recommendations made by the various officers who reviewed petitioner's Article 138 file (*id.* at A5). The court pointed out that "Article 138 is an internal, military mechanism for handling complaints" and concluded that "judicial deference in matters of internal military management" compelled the conclusion that it "lack[ed] jurisdiction to review the merits of [petitioner's] Article 138 claim" (*id.* at A5, A4).

Turning to the BCNR's decision concerning petitioner's employment-related claims, the district court undertook review of that decision and held that the BCNR's conclusions were neither arbitrary, capricious, nor lacking a basis in substantial evidence (Pet. App. A7). The court stated that the BCNR had "carefully addressed [petitioner's] complaints both as to the accuracy of his fitness reports and as to the correctness and fairness of his failures of selection for promotion" (*ibid.*). The court recited the BCNR's findings that petitioner's "record before both promotion selection boards was substantially complete," that there was no indication that the 1983 Selection Board was even aware of petitioner's Article 138 Complaint, and that petitioner's record was not "so good that his failure to be promoted *must* have been on improper considerations" (*ibid.* (emphasis added)). The court determined that "these findings [were] reasonable and supported by substantial evidence" (*ibid.*).

5. Petitioner filed a notice of appeal to the Court of Appeals for the District of Columbia Circuit. On May 31, 1985, the court of appeals concluded that, because the case involved a back-pay claim and hence was based in part upon the Tucker Act, 28 U.S.C. 1346(a)(2), the appeal was required to be heard in the Court of Appeals for the Federal Circuit. Pet. App. A9-A18 (citing 28 U.S.C. 1295(a)(2)). The appeal was accordingly transferred to that court pursuant to 28 U.S.C. 1631.

On January 23, 1986, in a per curiam judgment order, the Federal Circuit affirmed the district court's decision "on the basis of that court's December 6, 1983 opinion" (Pet. App. A1). A request for rehearing, with suggestion for rehearing en banc, was denied on April 1, 1986.

SUMMARY OF ARGUMENT

I.

There is no justiciable controversy between petitioner and respondents at this stage of the litigation. In his brief, petitioner has marshalled his every grievance against the military without regard to considerations of standing or mootness or relevance to the question upon which the Court granted certiorari. But neither singly nor together do these various complaints add up to anything susceptible to this Court's review.

Petitioner's allegations can be grouped into four general categories: (1) that he was given biased performance evaluations and wrongly passed over for promotion; (2) that his First and Fifth Amendment rights were violated during the investigation of his Article 138 Complaint; (3) that his transfer out of OCS and removal from the ADB were improper; and (4) that third parties at OCS, including pregnant female Marines and defendants at courts-martial and ADB proceedings, have had their rights violated.

No justiciable controversy is to be found in any of these categories. (1) Petitioner's employment-related claims were rejected by the BCNR, whose decision was reviewed and affirmed by both the district court and the court of appeals. Petitioner did not seek certiorari on that issue, and the judgment against him on those claims is therefore final. (2) Petitioner's constitutional allegations were also considered on the merits by the district court and rejected. Petitioner has advanced no argument to suggest that the decision of the district court, as affirmed by the court of appeals, was erroneous. (3) Given petitioner's disability retirement from the Marine Corps, his claims that he was wrongly transferred out of OCS and improperly removed from the ADB are now moot. (4) Petitioner is not a pregnant female Marine and he was never a defendant at either a court-martial or an ADB proceeding. His attempt to redress injuries allegedly suffered by such third parties fails for lack of standing.

II.

The questions posed by petitioner in his petition and in his brief are not presented in this case. Petitioner's constitutional claims were reviewed on the

merits and rejected by the district court. His claims for equitable relief, to the extent that they related to those constitutional claims or to his challenge to the decision of the BCNR, were also reviewed and rejected. Thus, the district court did not hold, and we do not contend, that military personnel are "barred from all redress in civilian courts for constitutional wrongs" (Pet. i) or that military personnel should be categorically "denied judicial review when seeking only equitable relief for Constitutional, statutory, or regulatory violations committed by their superior officers" (Br. i).

The question presented by this case, assuming petitioner has standing to raise it, is whether federal courts should review Article 138 grievance proceedings. We contend that such review is both inappropriate and unnecessary. Article 138 was designed by Congress as an internal mechanism for the correction of military grievances. The military has established numerous regulations to make this remedy broadly available to servicemen without compromising the command structure and the demands of discipline. Courts are ill-equipped to review either those regulations or the merits of the myriad grievances that a serviceman can raise in an Article 138 Complaint. Congress has not authorized such review, and the settled reluctance of courts to intervene in the internal management of the military counsels against it.

Furthermore, such review is unnecessary. After exhausting his military remedies, an aggrieved serviceman has various avenues available to him by which judicial review of military decisions can be and frequently is obtained. To the extent that the underlying substance of an Article 138 Complaint of

Wrongs presents a judicially cognizable controversy, that controversy can be presented to the courts through one of these avenues explicitly designed by Congress or mandated by the Constitution. But in such cases, review is of the underlying controversy, not of the military's internal grievance process. Thus, all of a serviceman's constitutional, statutory, and regulatory rights, to the extent they are cognizable in federal court, can be protected without involving the courts at all in Article 138 proceedings.

ARGUMENT

I. THERE IS NO JUSTICIABLE CONTROVERSY BETWEEN PETITIONER AND RESPONDENTS AT THIS STAGE OF THE LITIGATION

Article III of the Constitution confines federal courts to the adjudication of actual "cases" and "controversies." The principal component of this restriction is the requirement that the party invoking the court's jurisdiction have "standing" to maintain his suit. *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). Standing itself is a complex notion, embracing both prudential and constitutional considerations. See *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 474-475 (1982). But it is well settled that, at an "irreducible minimum" (*id.* at 472), the plaintiff must "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. at 751. See also *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). Furthermore, this "irreducible minimum" must exist at all stages of the litigation. If at any time there ceases to be a live controversy between the parties, the case is moot. *Iron Arrow Honor Society* v. *Heckler*, 464

U.S. 67, 70 (1983) (per curiam); *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974) (per curiam).

This Court has stated that the typical standing inquiry "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen* v. *Wright*, 468 U.S. at 752. That inquiry is complicated in the instant case by the fact that petitioner brought two separate causes of action in district court, one seeking review of the BCNR decision and the other seeking review of his Article 138 Complaint. In seeking judicial review of the Article 138 proceeding, moreover, petitioner advanced both constitutional and nonconstitutional claims, and he sought relief both on his own behalf and on behalf of anonymous third parties.

Petitioner (*e.g.*, Br. 36-37) indiscriminately intermixes these various claims, altogether heedless of their relevance to the question on which he sought certiorari and of his own standing either to have raised them initially or to pursue them now. It is necessary, therefore, as a preliminary matter to separate out the various strands of petitioner's district court complaint, ascertain which of his claims are fairly encompassed by his petition for certiorari, and determine whether any of those claims presents a live controversy that petitioner has standing to pursue. Once the dust clears, we believe it apparent that in its present posture petitioner's lawsuit is not justiciable.

A. Petitioner's Employment-Related Claims Were Reviewed And Rejected By The Courts Below, And Petitioner Has Not Sought Certiorari On That Question

Petitioner claims to have suffered employment-related injuries traceable to respondents. First, he

contends (Br. 4, 6, 36, 37-38) that, as a result of his complaints about sex discrimination against female OCS Marines, he was given biased and inaccurate performance evaluations by Colonel Cooper which led to his being twice passed over for promotion.[4] Second, petitioner argues (Br. 3, 22, 37) that the Selection Board considering promotions to Major retaliated against him for his Article 138 Complaint by improperly denying him a promotion.[5]

Neither of these employment-related claims is properly before this Court. All of petitioner's allegations concerning his service record—including his fitness reports and promotion passovers—were con-

[4] Despite some intimations to the contrary (Br. 4, 37-38), petitioner was not, in the end, subjected to automatic discharge due to twice failing to gain promotion. Rather, as he himself acknowledges (Br. 6 n.8), he was retired from the Marine Corps due to physical disability.

[5] Although petitioner is somewhat vague on this latter point (see, *e.g.*, Br. 3, 22, 37), the alleged retaliation presumably consisted of his being passed over for the *second* time by the Selection Board. This Board met from March 8 to April 7, 1983 (J.A. 12), after Colonel Lawson had completed his investigation and issued his report on the Article 138 Complaint. Petitioner contended before the BCNR that, somehow, the Selection Board must have known about his Article 138 Complaint and failed to select him because of it. Although the BCNR found petitioner's allegations on this point completely unsubstantiated (J.A. 19-20), here at least there was a chronological possibility of retaliation. By contrast, the allegedly biased performance evaluations and the first promotion passover all occurred *before* petitioner made the Article 138 Complaint and, so, could not have been taken in retaliation for that Complaint. The two evaluations covered the periods June 23 to November 30, 1981, and December 1, 1981 to May 31, 1982; petitioner was first passed over for promotion in April, 1982; he did not file his Article 138 Complaint until September 29, 1982. J.A. 8-10.

sidered and rejected by the BCNR. The BCNR found "no basis for removal of either of the two contested fitness reports" and hence found "nothing objectionable in the fact that one or both of those reports was in Petitioner's record before the 1982 and 1983 promotion boards" (J.A. 19). The BCNR found that "Petitioner's record before both boards was substantially complete" and that neither of his failures of selection for promotion "was erroneous or unjust" (*ibid.*). And the BCNR expressly rejected petitioner's contention that he had been passed over in retaliation for his Article 138 Complaint (J.A. 19-20). The BCNR's decision was reviewed at petitioner's request by the district court and was affirmed "as supported by substantial evidence" (Pet. App. A7). That determination was in turn affirmed by the court of appeals (*id.* at A1). Petitioner did not seek certiorari on this question, nor would such fact-bound contentions have merited this Court's attention.

Petitioner's request for review by this Court (see Pet. i, 6) was restricted to the question "whether a district court has the jurisdiction to review an Article 138 proceeding." Petitioner's wide-ranging allegations concerning retaliation and promotion denial were not part of his Article 138 Complaint and have nothing to do with either the substance or the processing of that Complaint. Petitioner's employment-related claims therefore are not before this Court, and those claims must be ignored in determining whether petitioner's lawsuit in its present posture presents a justiciable controversy.

B. Insofar As Petitioner Raised Constitutional Objections To The Manner In Which His Article 138 Complaint Was Handled, His Arguments Were Considered and Rejected By The Courts Below, And Petitioner Has Not Challenged The Merits Of Those Constitutional Holdings

Petitioner alleges two species of constitutional injury connected with his Article 138 Complaint. He asserts that "the Article 138 Complaint investigation violated the Due Process Clause of the Fifth Amendment" (Br. 36). And he asserts that "his First Amendment right to free expression was chilled by Colonel Cooper's biased fitness reports and by the command influence exerted by Colonel Cooper" (*ibid.*). His First Amendment claims also appear to encompass the promotion board's supposed retaliation "against those who made official complaints" (Br. 37). Once again, of course, petitioner is intermixing the substance of his Article 138 Complaint with employment-related claims which formed no part of that Complaint and which, as we have shown above, are not properly before this Court. More fundamentally, however, petitioner proceeds from the erroneous premise that the district court refused to consider his constitutional claims, and states that the question presented (Pet. i) is "[w]hether citizens should be barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service."

This case does not present that question. Although the district court "conclude[d] that it [could] not reexamine the substance of the Article 138 decision" (Pet. App. A5), the district court did consider, and reject, petitioner's First and Fifth Amendment objections to the manner in which the Article 138 investigation was conducted. The court specifically held

"that the processing of [petitioner's] Article 138 complaint comports with constitutional requirements" (Pet. App. A6). It concluded that "[t]he investigation, report of findings, and remedial action satisfy the minimum standards of procedural due process" (*ibid.*). And it concluded that petitioner's "allegations of [F]irst [A]mendment violations similarly do not warrant relief" (*ibid.*). Because the district court did in fact consider the alleged constitutional defects in the Article 138 proceeding, this case does not present the question whether military personnel "should be barred from all redress in civilian courts for constitutional wrongs" (Pet. i). And because this case, therefore, provides no occasion for the Court to consider the terms on which judicial review of a serviceman's constitutional claims might be permitted, petitioner's extended discussion of that issue (Br. 35-43) is beside the point.

Petitioner, moreover, has advanced no argument that would tend to show that the district court's rejection of his constitutional claims was erroneous. Petitioner nowhere specifies the procedural defects that allegedly tainted the investigation of his Article 138 Complaint, much less contends that the defects, if any, were such as to violate the Due Process Clause. In fact, a review of the procedural steps comprising the investigation (see pages 5-10, *supra*) shows that it was conducted both thoroughly and fairly. Nor does petitioner offer any argument to suggest that the district court erred in rejecting his First Amendment contentions. Indeed, those contentions are largely based on allegations about fitness report bias and promotion board retaliation that the BCNR and the district court found to be factually unsupportable. In short, petitioner has said nothing

to support reversal of the judgment below on the merits of the constitutional issues.

C. Insofar As Petitioner's Article 138 Complaint Advanced Generalized Grievances And Addressed Wrongs Allegedly Suffered By Third Parties, Petitioner Lacks Standing To Pursue His Claims In Federal Court, And His Request For Judicial Review Of Those Claims Was Properly Dismissed

In his original Article 138 Complaint, petitioner alleged that there existed poor morale at OCS and improper command influence over courts-martial and administrative discharge proceedings. His Complaint requested that these matters be investigated and that "appropriate administrative action be taken to assure this situation does not occur in the future" (Art. 138 Rec. 39). Petitioner reiterates his allegations about improper command influence here (Br. 3, 5-6, 10-12, 16-17, 25, 36-38), supplementing them with allegations about sex discrimination against pregnant female Marines (Br. 6, 45).[6]

Petitioner has not alleged that he was a pregnant female Marine. Nor has he alleged that he was ever a defendant at a court martial or ADB proceeding, such that he could have been personally aggrieved by any reluctance of other individuals to vote or testify in accordance with their consciences. Petitioner nevertheless asserts (Br. 44-45) that he has standing "to submit a complaint on behalf of pregnant Marines, of oppressed members of Administrative Discharge Boards, and of any persons dissuaded from testifying on behalf of another due to command influence exercised by Colonel Cooper." Petitioner also asserts a generalized interest in seeing Article 138 and its accompanying regulations complied with —to ensure, "in other words, that Respondents obey the law" (Br. 38; see *id.* at 43).

Petitioner plainly lacks standing to advance these claims in federal court. As noted above, in order to have standing a litigant must "allege personal injury fairly traceable to the defendant's unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. at 751. It is well established that a person cannot establish standing by piggybacking on harms allegedly suffered by absent third parties. *Warth* v. *Seldin*, 422 U.S. 490, 502 (1975); *Sierra Club* v. *Morton*, 405 U.S. 727, 733-734 (1972). In seeking to vindicate the rights of women Marines and court-martial defendants, petitioner advances concerns in which he "has an interest but no direct stake." *Diamond* v. *Charles*, No. 84-1379 (Apr. 30, 1986), slip op. 11. Such an "abstract concern * * * does not substitute for the concrete injury required by Art. III." *Id.* at 11-12 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 40). The power to seek judicial review "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond* v. *Charles*, slip op. 7 (quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)).[7]

---

[6] Petitioner's belated allegations of discrimination against women Marines at OCS formed no part of his Article 138 Complaint. Petitioner's statement to the contrary (Br. 3) is mistaken, as even a cursory reading of his Article 138 Complaint reveals. Art. 138 Rec. 17-26, 37-39, 41-43. The only mention of sex discrimination in the entire Article 138 proceeding is contained in a statement of a *witness*, Captain Becker. *Id.* at 50-52. Captain Becker did not initiate an Article 138 Complaint on her own, nor could she join in petitioner's Complaint. JAGMAN 1106b; Reg. App. 6. And petitioner never suggested that he was adopting these claims as his own.

[7] Petitioner contends that he has standing to use an Article 138 Complaint to vindicate the rights of third parties on the

Nor does petitioner's abstract interest in ensuring compliance with Article 138 and its accompanying regulations afford him standing. "[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen* v. *Wright*, 468 U.S. at 754. Petitioner must have a concrete interest stemming from a "distinct and palpable" injury. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. at 100. As a Marine asserting generalized grievances about the Marine Corps, petitioner has no more of an individual stake in the outcome than a person seeking to complain of governmental misconduct based solely on his status as a citizen. "This Court has repeatedly rejected claims of standing predicated on 'the right, possessed by every citizen, to require that the Government be administered according to law.'" *Valley Forge Christian College* v. *Americans United*, 454 U.S. at 482-483 (quoting *Fairchild* v.

---

theory that Navy regulations require Marines to "report to proper authority offenses committed by [Marine personnel] which come under their observation" (Br. 44 (original quotation marks omitted)). This contention is doubly flawed. First, the general obligation to report observed misconduct (Navy Regs. 1139; Reg. App. 18) does not translate into a right to use Article 138 to make that report. Article 138 is designed only to redress grievances personal to the complainant; a serviceman is not permitted to raise third-party or generalized grievances. See JAGMAN 1104(b), Reg. App. 5; Nemrow, *Complaints of Wrong Under Article 138*, 2 Mil. L. Rev. 43, 56 (1958). Second, and more importantly, even if a serviceman could use Article 138 to report general misconduct in the military, it would not follow that he had standing to air third-party grievances in federal court. A citizen has a civic duty to report suspected crimes to the police; but he does not have standing to invoke a court's jurisdiction to challenge the manner in which the police force goes about investigating tips. See *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973).

Hughes, 258 U.S. 126, 129 (1922)). Legal questions must be resolved, "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College* v. *Americans United*, 454 U.S. at 472.[8]

---

[8] Petitioner claims (Br. 43) that a ruling in his favor "as to command influence, sex discrimination and the substance of his Article 138 Complaint, could only have served to enhance the military society by showing the lower ranks that even colonels can, and when appropriate should, be disciplined." But petitioner is obviously without standing to request, and the federal courts without jurisdiction to provide, such discipline, however salutory petitioner considers it to be. *Diamond* v. *Charles*, slip op. 9; *Linda R.S.* v. *Richard D.*, 410 U.S. at 619. "The federal courts were simply not constituted as ombudsmen of the general welfare." *Valley Forge Christian College* v. *Americans United*, 454 U.S. at 487.

Furthermore, aside from the disciplining of Colonel Cooper, petitioner appears to have received all the relief that he requested. With respect to his claims of illegal command influence, he asked simply that they be investigated and that appropriate action be taken to assure that the problem did not recur. Art. 138 Rec. 39. His claims were investigated and, despite the lack of any specific finding of wrongdoing on Colonel Cooper's part, the Commanding General did order that steps be taken to ensure that all subordinate leaders and members of OCS fully understand the prohibition against improper interference in judicial and administrative proceedings, and that their participation in such proceedings would not be subject to improper scrutiny. *Id.* at 14.

In addition, although petitioner failed to assert any sex discrimination claims in his Article 138 Complaint, the Commanding General also advised Colonel Cooper of Captain Becker's allegation about discrimination against women students at OCS. The Commanding General neither accepted nor rejected this allegation, but it was a matter that he believed should be brought to Colonel Cooper's attention. He did so by directing that policies concerning women Marines at OCS be formalized in accordance with applicable service regulations. Art. 138 Rec. 14-15.

D. Insofar As Petitioner's Article 138 Complaint Alleged Injury Personal To Himself, His Claims Are Now Moot Or Are Otherwise Nonjusticiable

In his Article 138 Complaint, petitioner might be thought to have advanced two claims of concrete injury that were personal to himself and accordingly could provide him with standing to challenge the investigation of that Complaint. Petitioner contended (Art. 138 Rec. 38-39) both that he was transferred from OCS to another MCDEC unit, and that he was subsequently removed from the ADB, as a direct result of Colonel Cooper's dissatisfaction with his voting record on the Board. Both of these contentions were examined and rejected during the Article 138 investigation, and, as we explain below, we believe that the district court properly declined to undertake judicial review of these aspects of petitioner's complaint. There is, however, no need for this Court to consider the correctness of the district court's declination of such jurisdiction, since both of petitioner's claims of injury are now moot.

Petitioner originally cited his transfer from OCS merely as an example of what he considered to be improper command influence. He specifically noted in his Article 138 Complaint that he was not seeking reassignment to OCS because he believed that he would no longer be effective in that post (Art. 138 Rec. 44). Even if petitioner had requested reassignment to OCS, however, that request would now be moot due to petitioner's disability retirement from the Marine Corps. Reassignment to OCS is not a possible form of relief; nor is there any other form of relief that petitioner has requested or that a court could grant to redress this alleged wrong. Thus, petitioner's allegedly improper transfer from OCS does not present a live controversy.

Petitioner's claim that he was improperly removed from the Administrative Discharge Board is likewise moot. During the Article 138 investigation, it was determined that petitioner's removal from the Board, even though not improperly motivated, had been accomplished in an administratively incorrect manner. Art. 138 Rec. 106-107. Petitioner was thereupon reinstated as a voting member of the ADB, notwithstanding his transfer from OCS. Petitioner in fact continued to participate in ADB proceedings as his schedule and medical condition permitted, until the term of the Board to which he had been appointed expired on December 31, 1982. Since petitioner has already received the relief he requested on this score, and since his retirement renders further relief along these lines impossible, this claim of injury also fails to present a live controversy.

In a subsequent endorsement to his Article 138 Complaint, petitioner did allege a third species of "injury" personal to himself, but not of a kind cognizable in federal court. In the course of the Article 138 proceedings, Colonel Cooper responded to petitioner's Complaint of Wrongs with comments that petitioner considered unfavorable to himself and incorrect. Petitioner thereupon amended his Complaint to include a rebuttal to that material and a demand that Colonel Cooper make "a formal, written apology for and a retraction of all adverse matter affecting me." Art. 138 Rec. 26. Neither this alleged affront, however, nor petitioner's umbrage and demand for satisfaction, create a justiciable controversy.

Petitioner's service record was totally unaffected by Colonel Cooper's comments since the Article 138 proceeding is self-contained and forms no part of the complainant's service record (see note 15, *infra*). No personnel action was taken with respect to peti-

tioner on the basis of those comments.[9] Colonel Cooper's comments, therefore, caused no "concrete injury" to petitioner. *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 220-221 (1974). The harm to petitioner, if any, is necessarily abstract, since the only conceivable remaining redress would be a belated apology from Colonel Cooper. The federal courts do not exist to serve as seconds in such affairs of honor. "The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.'" *Valley Forge Christian College* v. *Americans United*, 454 U.S. at 471 (citation omitted).

In sum, all the various claims that petitioner has indiscriminately thrown into the hopper of his brief, whether considered separately or together, fail to create a justiciable controversy. His employment-related claims have already been decided against him both in the military and in the courts. He did not seek certiorari on that issue, and the judgment against him on those claims is therefore final. Petitioner's constitutional allegations were likewise rejected below, and he has advanced no argument to suggest that the decision of the district court, as affirmed by the court of appeals, was erroneous in that respect. To the extent that petitioner has claimed injury personal to himself, his claims are either moot or otherwise nonjusticiable. To the extent that he is seeking to redress injuries allegedly suffered by third parties, he has no standing to do so. And to the extent that petitioner might be thought to raise miscellaneous procedural or constitutional objections, not considered by the courts below, to the manner in which the Article 138 investigation was conducted, those objections must also fail on grounds of mootness or lack of standing.[10]

[9] As noted above, petitioner's claim that his Article 138 Complaint resulted in his non-promotion was considered by the BCNR and found to be groundless (J.A. 19-20), and that finding was affirmed by the district court as "supported by substantial evidence" (Pet. App. A7).

II. ARTICLE 138 WAS DESIGNED BY CONGRESS AS AN INTERNAL MECHANISM FOR THE CORRECTION OF MILITARY GRIEVANCES, AND JUDICIAL REVIEW OF ARTICLE 138 PROCEEDINGS IS THEREFORE INAPPROPRIATE

If, contrary to our primary submission, the Court determines that this case in its present posture does involve a justiciable controversy, then the question before this Court is whether federal courts should undertake routine judicial review of the substance of Article 138 grievance proceedings. As we have already intimated (pages 22-24, *supra*), the contours of that question are not nearly as broad as petitioner suggests. Because the district court did review petitioner's constitutional claims, the question presented is not, as he says in his petition, whether military personnel "should be barred from all redress in civilian courts for constitutional wrongs" (Pet. i). Nor is the reformulation of the issue set forth in petitioner's brief—"[w]hether military personnel should be denied judicial review when seeking only equitable relief for Constitutional, statutory, or regulatory violations committed by their superior officers" (Br. i)—an apt rendering of the question before this Court. The district court did not suggest—nor would we, in

[10] Because this case does not in fact present the question (Pet. i) on which the Court granted certiorari, and because petitioner's claims are nonjusticiable under a straightforward (albeit factually intricate) application of well-settled principles, the Court may wish to dismiss the writ of certiorari as improvidently granted.

light of this Court's settled precedents to the contrary (see pages 44-46, *infra*), suggest—that all avenues of equitable relief are closed to members of the military. Indeed, the district court did review the employment-related claims that petitioner had presented to the BCNR, and those claims, had they been meritorious, could well have yielded petitioner some form of equitable relief.

Rather, the question presented here is whether the district court erred when it concluded "that it [could] not reexamine the *substance* of the Article 138 decision" (Pet. App. A5 (emphasis added)). That conclusion, in our view, represents a determination that the federal courts should not undertake plenary review of Article 138 grievance proceedings to ascertain, for example, whether the investigation was conducted in accordance with military regulations, whether the credibility of various witnesses was properly evaluated, whether the conclusions reached were supported by the evidence, and whether the relief ordered, if any, was adequate to redress the grievance. The district court held, in other words, that the judiciary should not undertake to review Article 138 proceedings *qua* Article 138 proceedings, as if they were proceedings of some civilian federal agency. That holding is correct.

A. There Is No Presumption In Favor Of Judicial Review Of Military Decisions

Petitioner cites no statutory authorization for judicial review of Article 138 grievance proceedings. Rather, he relies (Br. 31) upon the general presumption in favor of judicial review of final agency actions. See, *e.g.*, *Lindahl* v. *OPM*, 470 U.S. 768, 778 (1985); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-141 (1967). Petitioner concludes that since Congress has not expressly precluded judicial review of Article 138 proceedings, such review follows as a

matter of course. Petitioner, however, has the presumption backwards. He overlooks the settled reluctance of courts to intervene in internal military affairs without an express mandate to do so.

The Constitution gives Congress the power "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cls. 12-14. These powers are "broad and sweeping" (*United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)), and it is well established that, in the regulation of the military, the role of the courts is decidedly subordinate to that of Congress. "[P]erhaps in no other area has the Court accorded Congress greater deference. * * * Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981).

Congress, in turn, has recognized that substantial discretion must be afforded to the military in molding an effective fighting force. *Brown* v. *Glines*, 444 U.S. 348, 360 (1980). "To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975). For this reason, "the military is, by necessity, a specialized society separate from civilian society. * * * [T]he military has, again by necessity, developed laws and traditions of its own during its long history." *Parker* v. *Levy*, 417 U.S. 733, 743 (1974). These "laws and traditions * * * are founded on unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress." *Schlesinger* v. *Councilman*, 420 U.S. at 757.

Courts, therefore, have been especially reluctant to intervene in any matter which "goes directly to the 'management' of the military [and] calls into question basic choices about the discipline, supervision, and control of a serviceman." *United States* v. *Shearer*, 473 U.S. 52, 58 (1985). The "complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) (emphasis omitted). On such matters, it is not appropriate for a "civilian court to second-guess military decisions." *United States* v. *Shearer*, 473 U.S. at 58. Indeed, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan* v. *Morgan*, 413 U.S. at 10.

In view of these principles, it would be plainly inappropriate for courts, when asked to pass upon military actions, to employ the same presumption in favor of judicial review that applies to decisions of civilian regulatory agencies.[11] The federal courts are

[11] Contrary to petitioner's assertion (Br. 45-46), the district court did not hold, nor do we here contend, that the Administrative Procedure Act, 5 U.S.C. 701(b)(1)(F), precludes judicial review of Article 138 proceedings. That Section defines the term "agency" to exclude "courts martial and military commissions," and we do not contend that an Article 138 proceeding is conducted by either of those entities. Our point is, rather, that Article 138 does not itself authorize, nor does any other statute expressly authorize, judicial review of the military grievance process. Thus, in keeping with the general reluctance of courts to intervene in internal military affairs and the special function of Article 138 as an internal mechanism for the correction of grievances, such review is inappropriate. In terms of the APA, Article 138 proceedings must be considered as "committed to agency discretion by law"

neither authorized nor equipped to oversee the military to that extent. In the military context, therefore, this Court has always looked for an express mandate before exercising its jurisdiction in a way that might interfere with the smooth functioning of the military. See, *e.g.*, *Feres* v. *United States*, 340 U.S. 135 (1950) (declining to apply the Federal Tort Claims Act to suits by servicemen for service-related injuries); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953) (declining to review propriety of duty assignment); *Burns* v. *Wilson*, 346 U.S. 137, 142, 144 (1953) (plurality opinion) (giving narrow interpretation to scope of federal habeas corpus relief available to servicemen); *Gilligan* v. *Morgan*, 413 U.S. at 10 (declining to assume jurisdiction over training, weaponry and orders of National Guard); *Schlesinger* v. *Councilman*, 420 U.S. at 757-758 (limiting ability of servicemen to obtain injunctive relief for alleged wrongs, including constitutional violations); *Chappell* v. *Wallace*, 462 U.S. 296 (1983) (refusing to permit military personnel to maintain suit to recover damages from a superior officer for alleged constitutional violations).

It is against the background of these cases that petitioner's claim must be judged. It cannot be assumed, simply because Congress has provided servicemen with a statutory grievance procedure within the military, that Congress thereby intended to grant the courts plenary review powers over that grievance process. "[C]ourts must be careful not to 'circumscribe the authority of military commanders to an extent never intended by Congress.'" *Brown* v. *Glines*, 444 U.S. at 360 (citation omitted).

and therefore nonreviewable (5 U.S.C. 701(a)(2)). Furthermore, the denial of an Article 138 Complaint is not "final agency action for which there is no other adequate remedy in a court" (5 U.S.C. 704). See pages 43-49, *infra*.

B. The Nature And Function Of The Article 138 Grievance Process Counsel Against Routine Judicial Review

The district court in this case observed that "[t]here is no statutory authority for judicial review of Article 138 proceedings" and that this Court's decisions reveal a "fundamental reluctance to intrude on military decisionmaking, as a matter of judicial prudence if not always judicial power" (Pet. App. A5, A6). Noting the absence of precedents to support such review, as well as the "well-established principle[] * * * of judicial deference in matters of internal military management," the court correctly concluded "that it [could] not reexamine the substance of the Article 138 decision" (Pet. App. A5).

Article 138 Complaints and similar avenues for the redress of a serviceman's grievances against his superior officers have been an integral part of the military's disciplinary structure for well over a century.[12] The Article 138 process is a completely internal mechanism, integrated into the military justice system, and designed to allow the military chain of command to address and correct such grievances. By providing for investigation, review and redress

[12] Article 138 itself, in substantially its present form, was enacted in 1950 as part of the Uniform Code of Military Justice. It was intended as a "virtual reenactment" of similar provisions in the Articles of War and the Navy Regulations. Nemrow, *Complaints of Wrong, supra*, 2 Mil. L. Rev. at 46, 47. See H.R. Rep. 491, 81st Cong., 1st Sess. 36 (1949); S. Rep. 486, 81st Cong., 1st Sess. 33 (1949). The Articles of War have recognized such a procedure since at least 1806 (W. DeHart, *Observations on Military Law and the Constitution and Practice of Courts-Martial* 252-253 (1962)), and commentators have traced the history of Article 138 back to a military code promulgated by King James II of England in 1688. Nemrow, *Complaints of Wrong, supra*, 2 Mil. L. Rev. at 46.

by the immediate superior of the officer at whom the complaint is directed, Article 138 serves two functions. First, it provides an institutional avenue by which servicemen may complain about their immediate superiors. Second, it provides the chain of command with an opportunity to resolve substantiated complaints at the lowest possible level. The latter is a practical necessity if the concepts of command authority and command responsibility are to have meaning.

Consistently with both these functions, internal regulations have been promulgated to ensure that Article 138 is a broadly available remedy, but not one without limits. The regulations in effect at the time of petitioner's Article 138 Complaint, which have changed only slightly since then, set limits on the scope of "wrongs" that are cognizable in, as well as who may file and who may be the subject of, a Complaint (JAGMAN 1104, 1105(a) and (b); Reg. App. 5). Regulations also govern the form of the Complaint, the time limitations and exhaustion requirements that attend the filing of Complaints, and procedures for the withdrawal of, and precluding joinder in, Complaints (JAGMAN 1106(a)-(f); Reg. App. 6-7). The procedures for the processing, investigation and review of Complaints are likewise specified in the regulations (JAGMAN 1105(d), 1108-1114; Reg. App. 6-9). All these regulations have evolved over time and represent the considered judgment of the military as to the appropriate method to respond to grievances without disrupting the chain of command and undermining discipline.

The courts are ill-suited to engage in a review of these procedural regulations and their application in the context of particular Article 138 proceedings. To permit this internal military mechanism to be

continually readjusted by civilian courts would involve those courts in a disruptive foray into the established command structure of the military. It is for the military, not the courts, to determine, compatibly with the need to maintain discipline and preserve the command structure, how wide-ranging a particular investigation should be; whether the complainant should be entitled to hire outside counsel, or merely consult with a JAG attorney; whether the superior officer at whom the complaint is directed should be permitted a rebuttal, including statements gathered from members of his staff; and other such procedural considerations, all of which petitioner appears to have challenged in this case. To involve the federal courts in assessing the propriety of these procedures on an ad hoc basis would wholly distort the Article 138 process and shatter the informed balance struck by the military between the twin needs to redress grievances and maintain the command structure. As this Court stated in *Burns* v. *Wilson*, 346 U.S. at 140 (footnote omitted):

> [T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.

Courts are even less suited to judge the merits of the myriad grievances likely to arise under Article 138. A grievance may be filed under Article 138 by any serviceman "who believes himself wronged by his commanding officer" (10 U.S.C. 938). The key term, "wronged," is left undefined, but is clearly wide-ranging. As one commentator noted of a predecessor provision: "In the absence of any definition of this

term * * *, the authorities have construed it as referring mainly to such wrongs as result from mistake of fact, misapprehension of law, or want of judgment on the part of the officer in regard to some matter connected with the 'internal economy' * * * of the command." W. Winthrop, *Military Law and Precedents* 600 (2d ed. reprint 1920), quoted in Nemrow, *Complaints of Wrong*, *supra*, 2 Mil. L. Rev. at 48. Article 138 is, in short, a general housekeeping provision and, given the distinctive characteristics of military life, it could become a vehicle by which servicemen would seek to involve the federal judiciary in the day-to-day administration of the Armed Forces.

As this Court explained in *Parker* v. *Levy*, 417 U.S. at 751, "the * * * relationship of the Government to the members of the military * * * is not only that of lawgiver to citizen * * *. [U]nlike the civilian situation, the Government is often employer, landlord, provisioner, and lawgiver rolled into one." Such comprehensive regimentation can give rise to complaints of unfairness covering every aspect of military life. Commanding officers are responsible for each serviceman's housing conditions, working conditions, duty assignments, training regimen, and discipline, as well as many other matters of greater or lesser importance to the serviceman. All such matters are potential subjects of Article 138 Complaints and, therefore, potential targets of judicial oversight. The "wrongs" covered by Article 138 include, among other things (Nemrow, *Complaints of Wrong*, *supra*, 2 Mil. L. Rev. at 54):

> [I]mproper deprivation of pass or leave privileges; denying, without sufficient cause, a married enlisted member of the command [the] privilege of living off the post and drawing sep-

arate rations; denying a noncommissioned officer, without sufficient cause, the privilege of occupying an available private squad room, or utilizing a separate noncommissioned officers' mess; imposing duties upon a noncommissioned officer which tend to degrade the rank; utilizing a noncommissioned officer for menial tasks, which could be performed by available subordinates; utilization, without proper authority, of subordinates on personal matters, such as cook, chauffeur, valet, gardener, and the like; requiring subordinates to purchase from personal funds articles of clothing, uniform, or equipment which are authorized but not required by regulations or custom; requiring subordinates to obtain permission to purchase or own [a] motor vehicle; failure to adhere to known command policies with respect to pretrial or post trial confinement; failure to consider, without justification, a subordinate for promotion although he is eligible and [a] vacancy exists; improper efficiency ratings; [and] imposition of punishment in guise of additional training.

As the above list of examples shows, Article 138 Complaints range too widely to admit of routine judicial review. Congress could not have intended, simply by providing an internal mechanism for the correction of such grievances, to authorize judicial oversight of all these aspects of military life. Nor are courts well qualified to oversee such matters, which will frequently involve military judgments that judges are ill-equipped to evaluate. As already noted, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan* v. *Morgan*, 413 U.S. at 10.

The extraordinary demands that military life, in all its aspects, places on servicemen, will inevitably give rise to tensions not found in civilian contexts.

See *Orloff* v. *Willoughby*, 345 U.S. at 94 ("Discrimination is unavoidable in the Army. Some must be assigned to dangerous missions; others find soft spots."). Moreover, commanding officers, who are responsible for insisting on military discipline, must often deal with servicemen who are unfamiliar with "the longstanding customs and usages of the services" (*Parker* v. *Levy*, 417 U.S. at 746-747) and with the "laws and traditions governing [military] discipline" (*Schlesinger* v. *Councilman*, 420 U.S. at 757). The military must "ingrain * * * reflexes" (*Department of the Air Force* v. *Rose*, 425 U.S. 352, 368 (1976)); the habit of automatic obedience that will lead a serviceman to risk his life in combat cannot be taught through the ordinary methods of civilian education.

For all these reasons, servicemen will sometimes be required to follow procedures and to adopt routines that may strike a civilian as arbitrary but that are, in the judgment of military officials, important in instilling the habits that create an effective fighting force. The federal district courts are simply not qualified to judge the propriety of such procedures and routines. Commanding officers, furthermore, should not "have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions," such as "whether and how to place restraints on a soldier's off-base conduct." *United States* v. *Shearer*, 473 U.S. at 58. Yet just such an uncalled-for intrusion into military life would follow if Article 138 Complaints were routinely reviewable. "It is not difficult to see that the exercise of such jurisdiction as is here urged would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities." *Orloff* v. *Willoughby*, 345 U.S. at 94-95.

In short, the potentially wide-ranging nature of Article 138 Complaints and the special nature of military training make Article 138 proceedings a particularly inappropriate candidate for judicial review. Such review would inevitably involve the federal judiciary in the daily micro-management of the military. Congress has not authorized such involvement, and courts should not be quick to assume it. This Court recently rejected arguments for plenary review of certain intramilitary disputes on the ground that such review would inevitably "tamper with the established relationship between enlisted military personnel and their superior officers," a relationship "at the heart of the necessarily unique structure of the Military Establishment." *Chappell* v. *Wallace*, 462 U.S. at 300. And, as the Court wrote on an earlier occasion (*Orloff* v. *Willoughby*, 345 U.S. at 93-94):

> [J]udges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates.

Citing these considerations, the few courts that have expressly considered the question have anticipated the courts below in concluding that routine judicial review of Article 138 proceedings would be inappropriate. In *Cortright* v. *Resor*, 447 F.2d 245 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972), Judge Friendly noted that Congress has established "in Art. 138 of the Uniform Code of Military Justice" a procedure for considering and fairly resolving military grievances, and he concluded that a federal court "do[es] not sit as a super-Judge Advocate General to review determinations made under that Article" (447 F.2d at 253). At least one district

court has reached the same conclusion. See *Moore* v. *Schlesinger*, 384 F.Supp. 163, 166 (D. Colo. 1974). To our knowledge, no court has ever accepted petitioner's argument that the federal courts should undertake plenary review of a completed Article 138 investigation.[13]

C. There Are Ample Alternative Means By Which A Serviceman Injured By Official Action May Seek Judicial Redress

"The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for

---

[13] Petitioner cites ten cases (Br. 35) to document his assertion that "[n]umerous courts have reviewed Article 138 Complaints," but none of those cases in fact supports that assertion. Six of the cases cited by petitioner did not involve Article 138 Complaints at all. In the seventh, *United States ex rel. Berry* v. *Commanding General*, 411 F.2d 822 (5th Cir. 1969), the court dismissed a suit brought by two servicemen for failure to exhaust their intramilitary remedies under Article 138. Accord, *Muhammad* v. *Secretary of the Army*, 770 F.2d 1494, 1495-1496 (9th Cir. 1985); *Ogden* v. *United States*, 758 F.2d 1168, 1178 (7th Cir. 1985); *McGaw* v. *Farrow*, 472 F.2d 952, 957-958 (4th Cir. 1973). In the eighth case, *Turner* v. *Callaway*, 371 F. Supp. 188 (D.D.C. 1974), the court specifically declined to review the serviceman's Complaint of Wrongs.

In the last two cases cited by petitioner—*Colson* v. *Bradley*, 477 F.2d 639 (8th Cir. 1973), and *Schatten* v. *United States*, 419 F.2d 187 (6th Cir. 1969)—the courts did order that an Article 138 investigation be *initiated* in response to a serviceman's Complaint of Wrongs. But neither of those courts undertook what petitioner requests here—plenary review of the substance of an already-completed Article 138 proceeding. Since the military authorities in the instant case did investigate petitioner's Complaint, there is no need for the Court here to consider whether *Colson* and *Schatten* were correctly decided.

civilians and one for military personnel." *Chappell* v. *Wallace*, 462 U.S. at 303-304. These largely parallel systems do, however, converge at a number of points. After exhausting his military remedies, an aggrieved serviceman has various avenues available to him, both from within the UCMJ and via record corrections boards, by which judicial review of military decisions can be and frequently is obtained. Furthermore, a serviceman with constitutional claims may in certain circumstances bring those claims directly to federal court. Given the availability of these options, judicial review of Article 138 grievance proceedings for substantive and procedural defects is not only unwise and unjustified, it is altogether unnecessary to preserve the rights of military personnel.

The most obvious point of convergence between the systems of military and civilian justice occurs in the case of courts-martial and administrative discharge proceedings. Each is governed by its own set of regulations providing procedural protections for the defendant, including a right to government-appointed counsel, and numerous layers of review within the military. Thus, a Marine may challenge an ADB decision before both the Navy Discharge Review Board (10 U.S.C. 1553) and the BCNR (10 U.S.C. (& Supp. III) 1552). Convictions of courts-martial may be directly appealed through several layers culminating in the Court of Military Appeals (10 U.S.C. 864-869). Once he has exhausted these intramilitary remedies, moreover, an aggrieved serviceman may seek redress in the civilian courts, whether by requesting review of an adverse BCNR decision (*Chappell* v. *Wallace*, 462 U.S. at 303) or, in the case of courts-martial, by petitioning for a writ of certiorari (10 U.S.C. (Supp. III) 867(h)) or seeking a writ of habeas corpus (*Burns* v. *Wilson*, 346 U.S. 137

(1953)). Thus, a defendant at a court-martial or ADB proceeding who was prejudiced by the sort of improper command influence alleged in petitioner's Article 138 Complaint could challenge the proceedings in federal court if he did not receive the redress to which he was entitled within the military.

Second, the Board for the Correction of Naval Records, which is composed of civilians appointed by the Secretary of the Navy, constitutes a broad avenue by which servicemen may obtain federal court review of a variety of claims pertaining to their service records. Congress has vested the Secretary of the Navy, acting through the Board, with plenary power to "correct any military record * * * when he considers it necessary to correct an error or remove an injustice" (10 U.S.C. 1552(a)). Under the Board's procedures, an aggrieved serviceman may request a hearing; if his claims are denied without a hearing the Board is required to provide a statement of its reasons. 32 C.F.R. 723.3(e)(2), (4) and (5), 723.4, 723.5. In appropriate cases the Board may issue orders leading to a retroactive promotion or an award of back pay (10 U.S.C. 1552(c)). Most significantly, as this Court recently noted, "Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." *Chappell* v. *Wallace*, 462 U.S. at 303. Indeed, the district court in the instant case did in fact review the various employment-related claims that petitioner presented to the BCNR, although the court, like the BCNR, found those claims to be without merit.

Third, as recently emphasized in *Chappell* v. *Wallace*, 462 U.S. at 304, "This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military

service." In appropriate circumstances, therefore, this Court has permitted servicemen to challenge the constitutionality of prescribed military procedures directly, rather than indirectly by means of an attack upon a court-martial or BCNR decision. See, *e.g.*, *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986) (First Amendment challenge to Air Force regulation prohibiting servicemen from wearing headgear indoors while on duty); *Brown* v. *Glines*, *supra* (First Amendment challenge to Air Force regulation authorizing base commanders to regulate circulation of petitions); *Parker* v. *Levy*, *supra* (attack on provisions of Uniform Code of Military Justice as unconstitutionally vague); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (equal protection challenge to benefit plans for military women). In view of the unique demands of military society, this Court has recognized that the circumstances in which servicemen should be permitted to raise such constitutional challenges ought to be narrowly defined. See, *e.g.*, *Chappell* v. *Wallace*, *supra* (holding that a serviceman may not bring a *Bivens* action seeking damages for alleged constitutional wrongs). But judicial review of constitutional claims remains available in a proper case.[14]

For these reasons, the Court would by no means be closing the courthouse door to members of the military by declining to make Article 138 proceedings routinely reviewable. Because the avenues to judicial relief discussed above are wholly sufficient to the

[14] In undertaking to review petitioner's First and Fifth Amendment claims here, the district court evidently concluded (Pet. App. A6) that those claims fell within the category of constitutional claims subject to immediate judicial review under this Court's decisions. Since, however, the district court rejected petitioner's constitutional claims as nonmeritorious, there is no need for the Court to consider whether that assumption of jurisdiction was correct.

redress of all military claims appropriately heard in federal court, there is no need for the courts to involve themselves at all in the military's internal grievance process. It is entirely possible, of course, that a claim qualifying for judicial review under one of the avenues discussed above might also be touched upon, directly or indirectly, during an Article 138 investigation. In such circumstances, however, the serviceman must seek review of the underlying claim, not of the Article 138 process by which the military investigated that complaint internally. A serviceman's underlying claim, in other words, is either judicially cognizable or it is not. If it is not judicially cognizable under the standards set forth by this Court, the claim becomes no more susceptible to judicial review simply because it happens to have been the subject of an Article 138 investigation.[15]

[15] Petitioner at one point suggests (Br. 47-48) that, even if Article 138 proceedings are not directly reviewable in federal court, the BCNR, whose decisions are judicially reviewable, should *itself* have reviewed the "record" of the Article 138 investigation for substantive and procedural errors. This backdoor effort by petitioner to secure review of his Article 138 Complaint is not properly before the Court. The BCNR expressly declined petitioner's request "for correction of the record of proceedings under Article 138," noting that the latter formed no part of "Petitioner's military personnel record" (J.A. 18). Petitioner not only failed to challenge this aspect of the BCNR's decision in the district court; he in fact took exactly the opposite position, stating unequivocally that the BCNR's decision not to review the Article 138 proceeding was correct. Memorandum of Points and Authorities in Support of Plaintiff's Cross-Motion for Summary Judgment at 27-28 ("More importantly, as plaintiff originally contended, Article 138 and the BCNR are separate methods for complaining of military misconduct. The BCNR * * * clearly agreed with this analysis in refusing to review the 138 Complaint investigation. Actually, their view is correct. * * * [A]rticle 138 proceedings and BCNR proceedings are separate remedies, the BCNR not

This Court has already recognized that Article 138 establishes an internal military grievance process distinct from the various avenues to judicial review discussed above. In *Secretary of the Navy* v. *Huff*, 444 U.S. 453 (1980) (per curiam), servicemen sought to have certain military regulations declared facially invalid as constituting an illegal interference with a serviceman's statutory right to communicate with members of Congress under 10 U.S.C. 1034. This Court refused to invalidate those regulations, concluding that the military's special structure, long recognized by both Congress and the courts, required that statutes pertaining to military matters be reviewed with particular sensitivity to the need for command authority (444 U.S. at 458). The Court noted that Article 138 was a means by which service members might complain about the misapplication of regulations governing the statutory right to communicate with Congress (*id.* at 457 n.5). Further, the Court stated that the federal courts could consider a claim that regulations implementing 10 U.S.C. 1034 were being misapplied (444 U.S. at 457 n.5). But the Court did not merge the two avenues of redress. The Court did not say that the Article 138 proceeding itself would be judicially review-

---

sitting as an appellate body to review Article 138 proceedings which occur in factual contexts such as that in the instant case." (citations omitted)). In any event, the question of the scope of the BCNR's statutory jurisdiction to correct military records is, by the terms of the statute, expressly delegated to the Secretary of the Navy, subject to approval by the Secretary of Defense. See 10 U.S.C. (& Supp.) 1552 ("The Secretary * * * *may* correct any military record * * * when he considers it necessary to correct an error or remove an injustice." (emphasis added)). In view of petitioner's failure to raise this argument below, this case presents no occasion for the Court to consider whether the BCNR's view of its own jurisdiction is accurate.

able. Rather, review would be directly of the application of the regulations to determine whether they improperly impinged upon a statutory right (*ibid.*).

Similarly, in *Chappell* v. *Wallace*, the Court discussed the various means by which servicemen who felt aggrieved by alleged military misconduct could seek relief. The Court mentioned both Article 138 and the BCNR. 462 U.S. at 302-303. With respect to the BCNR, the Court specifically noted (*id.* at 303) that the Board's decisions would be subject to judicial review. In contrast, the Court neither stated nor implied that judicial review was available for Article 138 Complaints. Rather, the Court described the Article 138 procedure as one component of "a comprehensive *internal* system of justice to regulate military life" (*id.* at 302 (emphasis added)).

In sum, the Article 138 grievance process is neither a suitable nor a necessary candidate for judicial review. Courts should permit the internal military procedure to function unimpeded. To the extent that the claim underlying a Complaint of Wrongs is cognizable in federal court, that controversy must be presented to the courts through one of the avenues explicitly designed by Congress or mandated by the Constitution. In such cases, there will be no point for the court even to consider the Article 138 proceedings and, therefore, no occasion for the court to disrupt the military's informed balance between the desire to redress legitimate complaints and the need to maintain command discipline.[16] All of a serviceman's constitutional, statutory, and regula-

---

[16] In an appropriate case, however, a court may well decide that exhaustion of intraservice remedies, including Article 138, is required prior to a resort to federal court. Such an exhaustion requirement would ensure against unnecessary judicial intervention in military affairs.

tory rights, to the extent they are cognizable in federal court, can be protected without involving the courts at all in the Article 138 process.[17]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

MICHAEL K. KELLOGG
Assistant to the Solicitor General

RICHARD A. OLDERMAN
CHARLES R. GROSS
Attorneys

KEITH T. SEFTON
Lt. Col., USMC
Office of the Judge Advocate General
Department of the Navy

MARCH 1987

---

[17] Once it is determined that petitioner's Article 138 Complaint does not merit judicial review simply in virtue of being an Article 138 Complaint, then his suit collapses. His underlying claims, insofar as personal to himself, concerned only his transfer from OCS and his removal from the ADB. Not only are these claims moot (see pages 28-29, *supra*), but this Court has already held that such claims are not reviewable in federal court. *Orloff* v. *Willoughby*, *supra* (declining to review propriety of duty assignment).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40259

NO. 86-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CPT JOHN R. VAN DRASEK, U.S.M.C. (RET.),
Petitioner,

v.

JOHN F. LEHMAN, JR.,
SECRETARY OF THE NAVY,
CHAPMAN COX,
ASSISTANT SECRETARY OF THE NAVY
FOR MANPOWER AND RESERVE AFFAIRS,
AND
THE UNITED STATES OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

STEPHEN G. MILLIKEN, ESQUIRE
Milliken, Van Susteren & Canan, P.C.
511 E Street, N.W.
Washington, D.C. 20001
(202) 393-7676

STUART A. STEINBERG, ESQUIRE
Veterans Outreach Services, Inc.
Vietnam Veterans Outreach Center
P.O. Box 747
Greenfield, MA 01302
(413) 773-3651

Attorney for Petitioner

ALPHA GRAPHICS, INC. • WASHINGTON, D.C. • (202) 331-8101

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Respondents, at pages 16-17 and 18-32 of their brief, attempt to split petitioner's claims and to remove them from their factual context to prevent this Court from resolving the question upon which the Court granted review.

The question as it is presented in the context of this 'whistleblower' case is whether a service member may seek relief in a civilian forum when his military career has been prejudicially terminated because he spoke out against violations of constitutional, statutory and regulatory authority in the service.

Petitioner's brief presents a question beyond mere review of the Article 138 Complaint for procedural and substantive correctness, and neither is his principal and first argument, at pages 26-30, so limited.

Petitioner asks this Court to reverse the decision of the United States Court of Appeals for the Federal Circuit in order to have the matters which were presented by petitioner's Article 138 Complaint, together with endorsements thereto, considered as a part of his claims under the First and Fifth Amendments. Thus, petitioner seeks independent scrutiny of the entire record in resolution of his suit for equitable relief for constitutional, statutory and regulatory violations committed by his superior officers which infringed his right to free expression of protected speech.

I. FIRST AND FIFTH AMENDMENT CLAIMS ARISING IN THE COURSE OF MILITARY SERVICE ARE COGNIZABLE IN THE FEDERAL COURTS

Respondents concede that civilian courts may hear constitutional claims by military personnel. Resp. Br. 44. That the petitioner, consistent with the determination of this Court in *Chappell v. Wallace*, 462 U.S. 296, 302-303 (1983), sought to avail himself of intra-service and

administrative remedies, by Article 138 Complaint and before the Board for Correction of Naval Records ("BCNR"), respectively, before seeking redress in the district court, does not justify the reduction or elimination of his constitutional claims in civilian courts. Were this so, a federal court could refuse to hear claims a service member raised in the first instance by Article 138 Complaint by claimed lack of jurisdiction; and simultaneously refuse to hear claims not presented by Article 1381 Complaint for the service member's failure to exhaust intraservice remedies. The courts below erred by failing to honor the determination of this Court in *Chappell v. Wallace*, 462 U.S. 296, 305 (1983), that "This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service" (citations omitted).

Honoring the decisions of this and lower Courts, petitioner has shown the deference to military authorities in military matters which the law requires. Having been denied relief, petitioner applied to civilian courts to rule upon First and Fifth Amendment claims arising from his having petitioned his government for the redress of grievances regarding equal employment opportunity and corruption of military tribunals by command influence.

Respondents incorrectly argue that petitioner urges "plenary" or "routine" review of Article 138 proceedings (Resp. Br. 35, 36-43). Petitioner seeks review of Article 138 proceedings for the constitutional, statutory and regulatory violations suffered in the course of military service. Specifically, in the context of this 'whistleblower' action, petitioner seeks to have the infringement of his protected speech reversed where he sought to have the Marine Corps respect equal employment opportunity and prevent command influence over military tribunals.

Thus arises the petitioner's original formulation of the question presented in the petition granted by the Court; that is, [w]hether citizens should be barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service" (Pet. i).

The courts below were required independently to scrutinize the whole record to insure protected speech is not infringed by retaliatory employment action.[1] Instead the district court decision, adopted by the court below, ruled that the court lacked jurisdiction to review the merits of petitioner's Article 138 Complaint (Pet. App. A-4 to A-6). The district court's entire explanation for rejecting petitioner's First Amendment claim was:

> [t]he investigation, report of findings, and remedial action satisfy the minimum standards of procedural due process. *Plaintiff's allegations of first amendment violations similarly do not warrant relief.* Pet. App. A-6 (emphasis added).

Petitioner claims that his military service was compromised on a basis that infringed his constitutionally protected interest in freedom of expression. *See Connick v. Myers*, 461 U.S. 138, 142-143 (1983) (and cases cited therein). Reiterating "that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment

---

[1]Respondent's contention that petitioner does not present a justiciable controversey at this stage of the litigation for lack of standing (Resp. Br. 24-25) ignores petitioner's disability retirement as a captain where correction of retaliatory fitness reports and resultant promotion passovers would entitle petitioner to consideration for the rank of major in his retirement. Respondents' argument depends upon the artificial division of his First Amendment claim into separate claims based upon the respective jurisdictional authorities of the BCNR and Article 138 proceedings. But, the Article 138 proceedings are inseparable from the events leading to petitioner's discharge from the Marine Corps.

values,' and is entitled to special protection" (*Id.* 461 U.S. at 145) (citations omitted), Justice White, writing for the majority reviewed the antecedents and progeny of *Pickering v. Board of Education*, 391 U.S. 563 (1968), in ruling that speech on a matter of public concern requires a reviewing court to scrutinize the reasons for discharge. *Id.* 461 U.S. at 146.[2]

As petitioner's speech addressed observance of equal employment opportunity and corruption of military tribunals by command influence it is submitted that the speech was unquestionably of public concern.

The protection to be accorded petitioner's speech is the greater because of the statutory and regulatory authorities requiring him to address the wrongs he perceived. *See* 10 U.S.C. Section 5947 and Navy Regulations ("NAVREGS") Chapter 11 (1973), paragraphs 1102 and 1139 discussed in petitioner's brief at pages 44-45. It is further significant that petitioner, from his earliest meeting with his commander through resort to civilian court, pursued his lawful obligation to report the offenses he observed solely by the resort to statutory and regulatory procedures. *See* Article 138 of the UCMJ,10 U.S.C. Section 938 (1982) and Ch. 11, NAVREGS, paragraph 1106, Pet. Br. 44.

The constitutional determination requires a balancing between the interests of the employee, as a citizen, in commenting on matters of public concern, and the interest of the employer in promoting the efficiency of the public services it performs. *Connick v. Myers, supra*, 461 U.S. at 142 *quoting Pickering v. Board of Education, supra*, 391 U.S. at 568. Here, it is submitted that speech required by law and wholly regarding matters of public concern is entitled to the greatest judicial protection by scrutiny of the entire record.

The First and Fifth amendment require a reviewing court "to examine ... the statements in issue and the circumstances under which they [are] made ..." and the

[2]The inquiry into the protected status of the petitioner's speech is one of law, not fact." *Id.* n. 7.

reviewing court "cannot 'avoid making an independent constitutional judgment on the facts of the case.'" *Connick v. Myers, supra*, 461 U.S. at 151, n. 10 *quoting Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) and *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964) (further citations omitted), respectively.

The fundamental flaw in the decision below is the affirmance by adoption of a district court decision which failed to honor this Court's repeatedly stated "obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgement does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286 (1964) (further citations omitted). The duty of the federal courts to "make an independent examination of the whole record" in the context of claimed infringement of protected rights of free speech and freedom to petition for the redress of grievances is not confined to defamation actions and protected speech in the context of public employment. *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). *Edwards* is particularly instructive here as the infringement of protected First Amendment rights was determined despite the state court criminal conviction for breach of the peace.

II. CIVILIAN COURT REVIEW OF CONSTITUTIONAL CLAIMS BY MILITARY PERSONNEL IS NOT DIMINISHED BY EXHAUSTION OF INTRA-SERVICE REMEDIES

By arguing that judicial review of Article 138 proceedings is inappropriate (Resp. Br. 31-43), the respondents would have this Court give preclusive effect to the intra-military determinations of the Article 138 proceedings in derogation of the federal court's obligation to independently review

protected speech in the entire context of the retaliatory action which is claimed to have infringed the First and Fifth Amendment rights.

Respondents would have this Court rewrite what is essentially deference to military control by an exhaustion of remedies requirement, to bar federal court enforcement of the Constitution, in this case of the First Amendment, by preclusion of issues first presented for review within the military.[3]

The matter is here aggravated as a result of abdication by the BCNR of its mandate, pursuant to 10 U.S.C., Section 1552(a), to review any military record, including the Article 138 record, which curtailment the district court accepted.

By stripping the factual record of petitioner's and others' Article 138 Complaint, and of the processing thereof, first the BCNR and then the district court only considered a portion of petitioner's claim of retaliatory action for his protected expressions.

In short, petitioner asks this court to rule not simply that the Article 138 Complaint in this case is reviewable but that petitioner's First and Fifth Amendment claims must be reviewed with the record of Article 138 Complaint included in the federal court's determination of petitioner's equitable claim. Thus, if this Court finds that review of the Article 138 Complaint must first be undertaken before the BCNR, petitioner asks that the decision below be reversed with instructions that the BCNR undertake the review.

---

[3]Exhaustion of administrative remedies does not give rise to issue preclusion, and especially does not bar federal court review of infringement of protected speech. Compare *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 501, 513-514 (1982) with *Allen v. McCurry*, 449 U.S. 90,94-96 (1980) and *See Edwards v. South Carolina*, *supra*, 372 U.S. at 235.

Should this Court determine, either that the BCNR lacks jurisdiction under 10 U.S.C. Section 1552(a) (1982) to review the Article 138 Complaint, or that the final action taken in this instance by the Secretary of the Navy in regard to both Article 138 and BCNR proceedings makes direct resort to the district court more appropriate, then remand to the district court is sought.

III. *CHAPPELL V. WALLACE* DOES NOT BAR JUDICIAL REVIEW OF CONSTITUTIONAL CLAIMS BY MILITARY PERSONNEL FOR EQUITABLE RELIEF

In determining the proper relationship between civilian courts and the military, this Court has refused to permit interference with military order and discipline by allowing military personnel to institute actions for damages against a commanding officer. *Chappell v. Wallace*, 462 U.S. 296 (1983). *See also Feres v. United States*, 340 U.S. 135 (1950).

Respondents' reliance upon *Chappell v. Wallace* (Resp. Br. 42-49) is misplaced. *Chappell* involved plaintiffs who had never pursued *any* administrative remedies, but instead had filed a claim against superior officers under *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) for race discrimination, and seeking to recover damages. This Court in *Chappell* held that "enlisted military personnel may not maintain a suit *to recover damages* from a superior officer for alleged constitutional violations." *Chappell v. Wallace*, *supra*, 462 U.S. at 305 (emphasis supplied). This Court did say that "civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlised military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment." *Chappell v. Wallace*, *supra*, 462 U.S. at 300. But this concern was limited by this Court's further explanation that it would be undermined, not by review of

equitable constitutional claims or review of administrative procedures, but by "a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." *Chappell v. Wallace, supra*, 462 U.S. at 304.

As respondents concede, "[a] serviceman with constitutional claims may in certain circumstances bring those those claims directly to federal court". Resp. Br. 44, and 45-46, citing *Goldman v. Weinburger; Brown v. Glines; Parker v. Levy* and *Frontiero v. Richardson*. To the foregoing list could be added *Schlesinger v. Ballard*, 419 U.S. 498 (1975), as another example of federal court review of a due process challenge, in that case based on sex discrimination arising in the context of discharge by promotion passover. What these cases have in common and what distinguishes this case and those from the damage actions sought to be maintained in *Feres v. United States* and *Chappell v. Wallace* is analogous to the same considerations giving rise to the distinction between absolute judicial immunity from damage suits and the lack of bar by judicial immunity to declaratory and injunctive relief. *Compare Stump v. Sparkman*, 435 U.S. 349, 364 (1978) (state judge absolutely immune from damages liability for judicial act even if erroneous) with *Supreme Court of Virginia v. Consumers Union of the United States, et al.*, 446 U.S. 719, 735-737 (1980) (state supreme court and chief justice properly held liable for equitable relief in their enforcement capacities).[4]

---

[4]A third category of cases, of which *Gilligan v. Morgan*, 413 U.S. 1 (1973) is a singular example, arises where the federal courts are asked to exercise continuing regulatory jurisdiction over enlistment, training, discipline, equipping and purely discretionary activities of the military. Petitioner does not, for example, ask the federal courts to tell the Navy how to have a sailor tie knots or the Army how to have a soldier shoulder a rifle. To the contrary, petitioner asks that the federal courts enforce the Constitution and insure that the military departments observe the laws of Congress and their own regulations.

It is upon the chilling of his and others' rights to freedom of expression that petitioner based his request for relief by presentation of his record without his commander's retaliatory fitness reports among other unlawful actions before newly constituted promotion boards. Petitioner also asked that a new and lawful Article 138 investigation be ordered.

Far from disturbing order and discipline within the military, the relief sought by Captain Van Drasek would enhance military order and discipline by requiring the military to obey the law. A decision in Captain Van Drasek's favor would give rise to an order supporting a service member's right to speak out against unlawful acts as statutes and military regulations required Captain Van Drasek to do. If the trial court finds that Captain Van Drasek is correct in his assertions that the Article 138 investigation was constitutionally flawed, not a matter peculiarly fit for exercise of military discretion, a lawful investigation may be ordered. Finally, a decision in Captain Van Drasek's favor would support equal employment opportunity within the military, and it would also serve to eliminate command influence over the military justice system.

Petitioner submits that the district court's decision failed to undertake the constitutional review necessary to guarantee that " 'our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.' " *Chappell v. Wallace, supra*, 462 U.S. at 304 *quoting* Warren, The Bill of Rights and the Military, 37 N.Y.U. L. Rev. 181, 188 (1962).[5]

---

[5]Comprehensive protection of the First Amendment, even in a community recognized to have comprehensive authority to control conduct, has been long sustained by this Court. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.*, 393 U.S. at 506.

CONCLUSION

For the foregoing reasons, Captain Van Drasek respectfully requests that this Court reverse the United States Court of Appeals for the Federal Circuit as it sustained the district court's order affirming the decision of the Secretary of the Navy and granting respondents' motion to dismiss.

Respectfully submitted,

STEPHEN G. MILLIKEN, ESQUIRE
Milliken, Van Susteren & Canan, P.C.
511 E Street, N.W.
Washington, D.C. 20001
(202) 393-7676

STUART A. STEINBERG, ESQUIRE
Veterans Outreach Services, Inc.
Vietnam Veterans Outreach Center
P.O. Box 747
Greenfield, MA 01302
(413)773-3651

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to Charles Fried, Solicitor General, Department of Justice, Washington, D.C. 20530, this 22nd day of April, 1987.

STEPHEN G. MILLIKEN

No. 86-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN R. VAN DRASEK,

Petitioner,

—v.—

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND VIETNAM VETERANS OF AMERICA IN SUPPORT OF THE RESPONDENT

ALVIN J. BRONSTEIN
American Civil Liberties Union
132 West 43rd Street
New York, NY 10036
(212) 944-9800

BARTON F. STICHMAN
Counsel of Record
DAVID F. ADDLESTONE
Vietnam Veterans of America
2000 S Street, N.W.
Washington, DC 20009
(202) 686-2599

Attorneys for *Amici*

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The American Civil Liberties Union and Vietnam Veterans of America respectfully move for leave to file a brief, annexed hereto, as Amici Curiae in this case.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members. The ACLU is dedicated to preserving and protecting the rights secured by the Constitution. Since its inception, the ACLU has participated in litigation to safeguard and to implement the guarantees of the Bill of Rights for all Americans, including those who serve the nation in the armed forces.

Vietnam Veterans of America (VVA) is the largest national organization devoted exclusively to representing the needs and interests of veterans who served in the United States armed forces during the Vietnam era. VVA's over 35,000 members, in 300

chapters throughout the United States, all served on active duty during the Vietnam era. Many of them remain on active duty in the armed forces today, serve in the reserve components, or are retired for disability or longevity. All have been and many still are, subject to the Uniform Code of Military Justice.

VVA was founded to improve the physical, legal, social and economic well-being of Vietnam veterans. It has long promoted legal efforts to assist veterans to obtain job training, health care, and disability benefits. In addition to representing veterans before the Board of Veterans Appeals, military Discharge Review Boards, and the Boards for the Correction of Military Records, VVA has participated in litigation to assist veterans on many issues. It has appeared as amicus curiae in several cases before this Court and the United States Court

of Military Appeals.

It is therefore respectfully requested that the Amici be granted leave to file this brief amicus curiae in the hope that it will assist the Court's resolution of this case, which raises important questions dealing with the ability of members of the armed forces to vindicate rights secured under the Constitution, the Uniform Code of Military Justice (UCMJ), and regulations implementing the UCMJ.

BARTON F. STICHMAN
Counsel of Record
DAVID F. ADDLESTONE
Vietnam Veterans
of America
2000 S Street, N.W.
Washington, DC 20009
(202) 686-2599

ALVIN J. BRONSTEIN
American Civil
Liberties Union
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Attorneys for Amici

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Legislative Materials, Periodicals, Other Documents

INTEREST OF AMICI

The Statement of Interest of Amici is contained in the Motion for Leave to File a Brief Amicus Curiae.

STATEMENT OF THE CASE

Petitioner Captain John Van Drasek had an exemplary and unblemished service record until he spoke out concerning his commanding officer's violations of Marine Corps regulations barring employment discrimination against women, and voted on Administrative Discharge Board (ADB) cases contrary to the position preferred by his commanding officer. Immediately in the wake of each of these activities -- not only constitutionally protected and lawful of themselves, but also intended to promote lawful and proper decisions by the service -- Captain Van Drasek suffered a series of career set-backs, each traceable to an adverse action by the commanding officer in question, that led ultimately to the forced conclusion of the military career to which he had devoted his adult life.

In October, 1981, Captain Van Drasek challenged the exclusion by his commanding officer, Colonel M.T. Cooper, of pregnant marines from courses at the NCO Leadership School at Quantico, Virginia, of which Van Drasek was Director. Col. Cooper's directives contravened the Marine Corps Equal Opportunity Manual, MCO P5354.1. Shortly thereafter, Col. Cooper filed a fitness report on Captain Van Drasek for this period in which Van Drasek received, for the first time in seven years, no ratings of "outstanding," which were necessary to his continued advancement in the service. The April, 1982 Major selection board passed him over for promotion, for the first time in his military career, in light of the ratings.

On May 18, 1982, Captain Van Drasek proposed regulations for the forthcoming NCO Leadership School academic year that would have formally echoed the Marine Corps ban on

discriminatory treatment of pregnant Marines. Van Drasek's proposed regulation was ignored in favor of one barring pregnant Marines from the School, again in direct contravention of the Corps' equal opportunity standards. Shortly thereafter, Col. Cooper filed a second, similar fitness report on Captain Van Drasek, with a similar, but more devastating, effect: Captain Van Drasek was again passed over for promotion. This second pass-over, however, meant his mandatory separation from military service.

Finally, in the summer of 1982, several months prior to the final pass-over decision, Captain Van Drasek, while serving an appointment on an ADB, joined a unanimous vote to retain a Marine implicated in a drug abuse case; Col. Cooper that very day ordered Van Drasek's removal from a subsequent case shortly thereafter. Soon after that, Captain Van Drasek again voted with a unanimous board

in recommending an honorable discharge for another Marine. Col. Cooper that very day ordered Van Drasek transfered away from the Officer Candidate School at Quantico, a move extremely detrimental to Van Drasek's chances of promotion.

As a result of all these actions, Captain Van Drasek brought an Article 138 Complaint of Wrongs against Colonel Cooper. Although finding that many other officers felt threatened by Cooper with the same pressures and actions that Van Drasek alleged, the investigating officer did not resolve the complaint in Van Drasek's favor. Following the second pass-over, in March, 1983, Van Drasek filed the instant action on June 17, 1983. The parties agreed to stay the district court action pending resolution of Captain Van Drasek's appeal to the Board for Correction of Naval Records (BCNR). Despite finding that Van Drasek's

transfer may well have improperly resulted from his votes on the ADB, and questioning Col. Cooper's judgment and fairness, the BCNR declined to take any action favorable to Captain Van Drasek, in part because it did not believe it had subject matter jurisdiction.

On December 6, 1983, the District Court for the District of Columbia dismissed Van Drasek's Article 138 complaint for lack of jurisdiction. Following transfer on May 31, 1985 from the United States Court of Appeals for the District of Columbia Circuit, the Court of Appeals for the Federal Circuit affirmed the dismissal on January 23, 1986, for the reasons stated in the district court opinion. Following denial of rehearing, Captain Van Drasek petitioned this Court for certiorari.

Captain Van Drasek asserts that the biased fitness reports, ultimately fatal to

his career, filed by his commanding officer and the improper "command influence" exerted over his status on the ADB violated several statutes, 10 U.S.C. § 837 (improper command influence); id. § 938 (investigation and redress of wrongs alleged by service members); and service regulations, MCDEC Order 5210.13C, 5210.1 (orderly transfer of personnel); SECNAVINST 1420.1, p.4, paras. 5(g)(3), 5(i)(2). In addition, Captain Van Drasek alleges that these actions chilled his first amendment right of free speech and constituted a deprivation of property in violation of the due process clause of the fifth amendment; and that the Article 138 Complaint investigation violated the due process clause of the fifth amendment.

SUMMARY OF ARGUMENT

Both the prior decisions of this Court and the mandate of the Congress make clear that federal courts have jurisdiction to review violations of constitutional, statutory, or regulatory authority by the military. The only question here presented is whether claims properly raised through Article 138 proceedings or before the various Boards for the Correction of Military (or Naval) Records fall outside this settled proposition.

It would defy both logic and fundamental fairness to hold that such complaints may not be afforded judicial review. Courts have consistently held that they should properly defer jurisdiction until have administrative remedies -- such as Article 138 and BCMR or BCNR proceedings -- have been exhausted. It is well settled that BCMR or BCNR actions are

reviewable in federal court. Furthermore, Article 138 complaints are properly reviewable before the BCMR or BCNR. Given that, it makes no sense to hold that members of the military who pursue intra-service remedies as required for judicial review cannot obtain such review because they are appealing from those very proceedings.

Furthermore, Congress clearly intended such administrative determinations, even by military departments, to be judicially reviewable under the Administrative Procedure Act. The only relevant exceptions to the APA's reviewability requirement are for "courts martial" and "military commissions," neither of which are applicable here. In fact, Article 138 procedures, established by Congress, are structured to facilitate judicial review. While there may be instances that counsel against judicial intervention into circumstances involving

particular military expertise and requiring special military autonomy, there is no need for, nor did Congress intend, a per se bar to federal court jurisdiction over appeals of the sort presented here.

The federal courts have an important role to play in ensuring that our armed forces, as much as any other instrumentality of our Government, comply not only with the Constitution, but with the statutes enacted by Congress in exercising its constitutional responsibility for the military, and with the administrative regulations established by the services themselves. Amici urge this Court to reaffirm the principle that the district court in this case may and should assert jurisdiction to hear Captain Van Drasek's claims.

ARGUMENT

PROCEEDINGS BROUGHT UNDER ARTICLE 138 ALLEGING VIOLATIONS OF CONSTITUTIONAL RIGHTS, STATUTORY AUTHORITY, OR THE MILITARY'S OWN REGULATIONS ARE REVIEWABLE BY THE FEDERAL COURTS

A. The Federal Courts Have Jurisdiction to Review Violations of Constitutional, Statutory, or Regulatory Authority by the Military Departments.

This case raises a simple, but important, question: Will our courts continue to ensure that the military comply with the commands of the Constitution, of Acts of Congress, and of their own regulations?

The decisions of this Court, and the mandate of the Congress, make it clear that the answer should be "yes."

The claims raised by Captain Van Drasek -- violation of the constitutionally secured right to due process of law and to freedom of speech, as well as violation of various federal statutes and administrative

regulations -- are not only serious and substantial, but also are precisely the types of claims that the federal courts have always stood open to review even in the military context.

This Court "has never held . . . that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." Chappell v. Wallace, 462 U.S. 297, 304 (1983) (citing Brown v. Glines, 444 U.S. 348 (1980); Parker v. Levy, 417 U.S. 733 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973)); see also Harmon v. Brucher, 355 U.S. 579 (1958); Dilley v. Alexander, 603 F.2d 914, 920 (D.C. Cir. 1979); Huff v. Secretary of the Navy, 575 F.2d 907, 911-14 (D.C. Cir. 1978), rev'd on other grounds, 444 U.S. 453 (1980) (per curiam); Martin v. Secretary of the Army, 455 F. Supp. 634, 638 (D.D.C. 1977); Cushing v. Tetter, 478 F. Supp. 960,

965 (D.R.I. 1979).

Redress is also available in the federal courts for wrongs that do not rise to the constitutional level: While "[a] member of the service who thinks that his commander has misapplied . . . regulations can seek remedies within the service" such as filing an Article 138 Complaint, "the federal courts are open to assure that, in applying the regulations, commanders do not abuse the discretion necessarily vested in them." Huff, 444 U.S. at 457 n.5.

"It is established beyond peradventure that the military, like any other agency, is bound by its own regulations." Martin, 455 F. Supp. at 638. Therefore, "[i]t is the duty of the federal courts to inquire whether an action of a military agency conforms to the law, or is instead arbitrary, capricious, or contrary to the statutes and regulations governing that agency." Dilley v. Alexander,

603 F.2d at 920 (citations omitted).

B. Article 138 Complaints Logically Fall Within the General Rule of Reviewability.

In Chappell, this Court directed that grievances by military personnel be presented pursuant to 10 U.S.C. § 938 (Article 138 complaint) and § 1552(a) (review by the Board for the Correction of Naval Records), and stated that BCNR determinations are subject to judicial review. 462 U.S. at 303 (citing Grieg v. United States, 640 F.2d 1261 (Ct. Cl.), cert. denied, 455 U.S. 907 (1981); Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979). While the analogous question of reviewability of Article 138 complaints was not presented in that case, there is no reason to think that the answer should be any different. In its reply brief in Huff, in fact, the Government conceded that, following the unsatisfactory disposition of an Article

138 complaint, "[f]urther review of the commander's decision may also be obtained by filing an action in federal district court. See Cortright v. Resor, 447 F.2d 245, 250-255 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972)." Reply Brief for Petitioners, Secretary of the Navy v. Huff, supra, at 1-2.

The individual interests that Congress sought to secure in creating Article 138 proceedings have been recognized by courts and commentators as highly significant.

> The right to seek redress of wrongs is an integral part of the complex of rights granted by the Congress to those subject to military law. Those to whom an application for relief under the provisions of this Article is submitted may not lightly regard the right it confers, nor dispose of such application in a perfunctory manner. Its provisions should not be construed by those charged with the administration of military justice, at any level, in a manner calculated to lead anyone to believe that the right of redress of wrongs is of minor importance and one which may be disregarded entirely or perfunctorily complied with.

Tuttle v. Commanding Officer, 21 U.S.C.M.A. 229, 230, 45 C.M.R. 3, 4 (1971). The logic of this Court's, and other courts', holdings makes manifest that the disposition of the individual interests Congress sought to safeguard under Article 138 are properly reviewable by the federal courts.

To hold otherwise would be to subject Captain Van Drasek, the only officer of his rank with Vietnam combat experience, to two "catch-22's" worthy of Yosarian's army: First, Captain Van Drasek would have been required to pursue Article 138 and BCNR relief before proceeding in federal court, see, e.g., United States ex rel. Berry v. Commanding General, 411 F.2d 822 (5th Cir. 1969) (on principles of comity, civilian court should not take jurisdiction where appellants failed to exhaust procedure available in military justice system); cf. Chappell v. Wallace, 462 U.S. at 303 n.1

(suggesting that "exhaust[ing] administrative remedies" -- such as Article 138 -- is necessary precedent to BCNR review, which is then "subject to judicial review" in federal court) -- only to find that his grievances were unreviewable once brought as an Article 138 complaint.

Second, while the Article 138 allegations would have been reviewable by the district court had the BCNR itself reviewed the Article 138 proceedings, Chappell, 462 U.S. at 303; Powell v. Marsh, 560 F. Supp. 636 (D.D.C. 1983); Heisig v. Secretary of the Army, 554 F. Supp. 623 (D.D.C. 1982); see also 5 U.S.C. § 704, any violations of due process and of the military's own regulations that resulted from the inadequate Article 138 investigation and the BCNR refusal to review it would bar vindication of the petitioner's rights precisely because of the BCNR refusal to review it. Cf. Baxter v. Claytor, 652

F.2d 181 (D.C. Cir. 1981) (where BCMR improperly declined jurisdiction, federal court took jurisdiction to order appropriate review of complaint by BCMR).

C. Congress Provided in the Administrative Procedure Act for Federal Court Review of Such Administrative Determinations by the Military Departments.

Such a result flies in the face of not only logic, but also the intent of the Congress and this Court's prior rulings. Persons aggrieved by a final agency action are presumed to be entitled to judicial review of the administrative decision unlesss there is "persuasive reason to believe" Congress intended to preclude review. Morris v. Gressette, 432 U.S. 491, 501 (1977); Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967). Before denying review, a court must find evidence of "a specific congressional intent" to bar review. Banzhaf

v. Smith, 737 F.2d 1167, 1169, 1170 (D.C. Cir. 1984) (en banc). "[W]here substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." Block v. Community Nutrition Inst., 467 U.S. 340, 351 (1984). Block identified certain factors -- including "specific language or specific legislative history" -- that are probative indicia of congressional intent to preclude review. Id. at 2456. But as this Court more recently made clear, Block did not repudiate the long line of prior Supreme Court cases requiring that Congress clearly manifest such an intent to deny review. See Lindahl v. OPM, 470 U.S. ___, ___, 84 L.Ed.2d 674, 684 (1985).

Congress has manifested no such intent as regards Article 138 proceedings. In fact, it has indicated just the opposite.

> The APA does not exclude the military departments per se from its coverage. The APA applies to each "agency," which is defined as "each authority of the Government of the United States. . .." Although sections 551 and 701 exclude certain military activities from their definition of "agency," and thus from almost all APA coverage, they deliberately do not exclude the military departments as organizations.

Folk, The Administrative Procedure Act and the Military Departments, 108 Mil. L. Rev. 135, 136-37 (1985).

As the APA's legislative history explains: "[I]t has been the undeviating policy to deal with types of functions as such and in no case with administrative agencies by name. Thus certain war and defense functions are exempted but not the War or Navy Departments in the performance of their functions." Senate Comm. on Judiciary, Administrative Procedure Act Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 191 (1947).

Thus, "[c]ourts considering the question

have found the APA applicable to the military departments except to the extent the APA specifically exempts certain of their functions." Id. "Although the Supreme Court has not addressed the issue directly, it has become widely accepted that the Act does apply to the military." Peck, The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities, 70 Mil. L. Rev. 1, 25 (1975).

The only exception to the APA's requirement of amenability to judicial review applicable to the military is for "courts martial and military commissions," as well as "military authority exercised in the field in time of war or in occupied territory." 5 U.S.C. § 552. The latter provisions are inapplicable here. As for the former, as the Defense Department's own legal journal states, "[n]either the APA nor its legislative history defines the terms 'courts

martial [sic]' or 'military commissions.' However, under common usage, these terms have a well understood and limited meaning." Folk, supra, 108 Mil. L. Rev. at 137 (footnotes omitted). Thus, a court-martial is

> a court of military or naval personnel for the trial of offenses against military law or the law of war, the formalities prescribed for convening courts-martial by the Uniform Code of Military Justice, the Manual for Courts-Martial, and regulations make it virtually impossible to confuse a court-martial with another type of military tribunal.

Id. at 137-38. "Military commissions," in contrast, "are far less common in military practice but still have a narrow function similar to that of a court-martial." Id. at 138. Such commissions are

> convened by military authority for the trial of persons not usually subject to military law who are charged with violations of the laws of war; and in places subject to military government or martial law, for the trial of such persons when charged with violations of proclamations, ordinances, and valid domestic civil and criminal

law of the territory concerned. Id. (quoting U.S. Dep't of Army, Reg. No. 310-25, Military Publications -- Dictionary of United States Army Terms, at 168 (Sept. 15 1975)); see also Madsen v. Kinsella, 343 U.S. 341, 345-47 & n.9 (1952) "in our military law, the distinctive name of military commission has been adopted for the exclusively war-court").

Article 138 proceedings clearly do not fall into these exceptions to reviewability. As implemented by Ch. XI, Manual of the Judge Advocate General Section 1101-14, Article 138 provides for a "court of inquiry" or "board of officers," which are mere advisory boards to the investigating officer who must "arrange to be advised of the results of the consideration of the complaint" by such bodies, and upon receipt of such advice, "shall complete his consideration of the complaint in light thereof, and shall

proceed" to forward the complaint for redress by proper authority. JAGMAN § 1104(a). It is this officer who retains primary jurisdiction to act upon the complaint, not the "court of inquiry" or the "board of officers;" such an officer, acting in an administrative capacity, certainly does not constitute a "military commission" or "court-martial." That the Court of Military Appeals also believes Article 138 proceedings to be amenable to judicial review is implicit in its statement that

> since that officer is required to report fully his disposition of the matter to the Secretary concerned, a record is thus prepared and preserved for judicial consideration, in the event his ruling is adverse to the applicant. Thus, a sound basis for judicial determination is obtained.

Tuttle v. Commanding Officer, 21 U.S.C.M.A. at 230, 45 C.M.R. at 4 (emphasis added). Finally, the military itself treats Article 138 proceedings consistently with the Freedom

of Information Act requirement that agencies that adjudicate must make the records of such adjudications available to the public, by indexing and making available for copying all denials of Article 138 complaints. See Folk, supra, 108 Mil. L. Rev. at 155 (citing settlement in Hodge v. Alexander, Civil No. 77-228 (D.D.C. May 13, 1977)).

The district courts in this case and in Moore v. Schlesinger, 384 F. Supp. 163 (D. Colo. 1974), were clearly incorrect, then, in concluding that Article 138 proceedings "are expressly excluded from [APA review by] 5 U.S.C. Section 701(b)(1)(F)." Moore, 384 F. Supp. at 166.

In contrast, the vast majority of courts that have addressed this issue have found that the federal courts may indeed take jurisdiction in the case of Article 138 complaints. See Colson v. Bradley, 477 F.2d 639 (8th Cir. 1973); United States ex rel.

Barry v. Commanding General, 411 F.2d 822 (jurisdiction retained); Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971) (same); Turner v. Calloway, 371 F.2d 188, 190-91 (D.D.C. 1974) ("jurisdiction [of Article 138 complaint] should be retained"); McKay v. Hoffman, 403 F. Supp. 467 (D.D.C. 1975) (jurisdiction retained); Allen v. Monger, 404 F. Supp. 1081 (N.D. Cal. 1975) (same).

> [I]t [is] clear that the civil courts may review any constitutional challenge to administrative activities of the military, not just those involving due process.... [I]t has been even more firmly established that civil courts may review military administrative actions challenged for violation of the Constitution, statutes, or regulations primarily for the protection of the individual.

Peck, supra, 70 Mil. L. Rev. at 56-57 (emphasis in original).

The federal courts recognize the need not to rush in and interfere with military decisions when such civilian judicial

intrusion would be unnecessary or detrimental to the special needs of the military. Thus, many courts have, for instance, adopted a fairly restrictive test, very protective of military autonomy, known as the Mindes test, see Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). See, e.g., Trerice v. Pedersen, 769 F.2d 1398 (9th Cir. 1985); Williams v. Wilson, 762 F.2d 357 (4th Cir. 1985); Navas v. Gonzalez-Vales, 752 F.2d 55 (1st Cir. 1984); Gonzalez v. Department of the Army, 718 F.2d 926 (9th Cir. 1983). Its stringency, and the standards it sets for avoiding interference with military functions traditionally committed to the discretion of the services, demonstrate that workable standards exist short of a per se bar to district court jurisdiction over appeals from Article 138 complaints and BCMR reviews. As demonstrated in the foregoing argument, moreover, such a wholesale declaration of

unreviewability would fly in the face of this Court's prior decisions and reasoning, as well as the clear intent of Congress that Article 138 complaints be subject to judicial review.

Captain Van Drasek here alleges significant violations of his rights and of the standards laid down for the military by Congress and by the Navy itself. Federal court review here would not interfere with the military's proper and normal functioning; in fact, it would ensure and foster that goal.

CONCLUSION

For the reasons stated, the decision below should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted,

BARTON F. STICHMAN
Counsel of Record
DAVID F. ADDLESTONE
Vietnam Veterans
of America
2000 S Street, N.W.
Washington, DC 20009
(202) 686-2599

ALVIN J. BRONSTEIN
American Civil
Liberties Union
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Attorneys for Amici

Amici gratefully acknowldge the assistance in the preparation of this brief of:

Eric B. Schnurer (bar application pending)
American Civil Liberties Union